Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

S. AUGUST FASONE,

Petitioner,

v.

CLINTON TOWNSHIP, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether evidence of discrimination occurring before the 1991 amendment of 42 U.S.C. § 1981 may be considered in determining whether an employer has engaged in an ongoing pattern of discrimination.

II

Whether an employer has a duty to interact with an employee in an attempt to find a reasonable accommodation under the Americans with Disabilities Act.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the court below were: S. August Fasone (the appellant below), Clinton Township (an appellee below), John W. Frost (an appellee below), Larry L. Wilkes (an appellee below), Penny S. Pember (an appellee below), Randy Stickle (an appellee below), and Rebecca Christian (an appellee below).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING IN THE COURT BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION OF THE COURT	1
STATUTORY PROVISIONS INVOLVED	2
BASIS FOR FEDERAL JURISDICTION	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. EVIDENCE OF DISCRIMINATION OCCURRING BEFORE THE 1991 AMENDMENT OF 42 U.S.C. § 1981 SHOULD BE CONSIDERED IN DETERMINING WHETHER AN EMPLOYER HAS ENGAGED IN AN ONGOING PATTERN OF DISCRIMINATION	8
A. The Sixth Circuit's Analysis Conflicts with Decisions of Other Circuits	11
B. The Sixth Circuit's Analysis Fails to Follow Decisions of this Court on Similar Issues	15

TABLE OF CONTENTS – Continued

Page

II. AN EMPLOYER HAS A DUTY TO INTERACT WITH AN EMPLOYEE IN AN ATTEMPT TO FIND A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT 17

A. Summary Judgment in a Reasonable Accommodation Case Requires the Employer to Bear the Burden of Showing Undue Hardship 17

B. The Sixth Circuit's Affirmance Of Summary Judgment Conflicts with Other Circuits' Decisions that the ADA Requires an Employer to Engage in an Interactive Process 21

CONCLUSION 25

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996) 22

Boyce v. Dickinson County, Kan., 1994 WL 174021 (D. Kan. 1994) 13, 14

Cunningham v. Kansas City Star Co., 995 F. Supp. 1010 (W.D. Mo. 1998) 12, 13

Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667 (7th Cir. 1998) 21, 24

Deane v. Pocono Medical Center, 142 F.3d 138 (3d Cir. 1998) 21, 22, 23, 24

Delph v. Dr. Pepper Bottling Co. of Paragould, 130 F.3d 349 (8th Cir. 1997) 12

DeNovellis v. Shalala, 124 F.3d 298 (1st Cir. 1997) 14, 15

Faragher v. City of Boca Raton, 1998 WL 336322 (U.S.) 12

Harris v. Forklift Sys., 510 U.S. 17 (1993) 12

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 16

Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004 (7th Cir. 1997) ... 21, 22

Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990) 15

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 14

Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997) 21, 22, 23

TABLE OF AUTHORITIES – Continued

Page

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 10

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) ..... *passim*

Russell v. Overland Police Dept., 838 F. Supp. 1350 (E.D. Mo. 1993) 13

Shiring v. Runyon, 90 F.3d 827 (3d Cir. 1996) 19

St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) 10

Stone v. City of Mount Vernon, 118 F.3d 92 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998) 18, 19, 20

Taylor v. Principal Fin. Group, 93 F.3d 155 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 586 (1996) 21, 23, 24

United Air Lines v. Evans, 431 U.S. 553 (1977) 16

Valentine v. American Home Shield Corp., 939 F. Supp. 1376 (N.D. Iowa 1996) 24

Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538 (7th Cir. 1995) 19, 21

White v. Honeywell, Inc., 141 F.3d 1270 (8th Cir. 1998) 11, 12

STATUTORY AND JURISDICTIONAL AUTHORITIES

U.S. Const. amend. XIV 2

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1343 2

28 U.S.C. § 1367 2

29 U.S.C. § 706 (Rehabilitation Act of 1973) 21, 22

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1983 ..... 2, 3

42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964)..... 11, 13, 14, 16

42 U.S.C. § 12101 18

42 U.S.C. § 12111 ..... 2, 3, 19

42 U.S.C. § 12112 2

29 C.F.R. § 1630.2 20

PETITION FOR WRIT OF CERTIORARI

The petitioner, S. August Fasone, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on April 3, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is reprinted in the Appendix (hereinafter "A___") to this petition at A1-A4. The Sixth Circuit's opinion affirmed both the unreported February 28, 1997 Opinion and Order of the United States District Court for the Southern District of Ohio, reprinted at A5-A11, and its unreported July 23, 1996 Opinion and Order, reprinted at A12-A32.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the Court of Appeals for the Sixth Circuit was entered on April 3, 1998. *See* A1. This petition is timely filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1981, a Reconstruction civil rights act as amended November 21, 1991. It also involves 42 U.S.C. §§ 12111 and 12112 of the Americans with Disabilities Act. The pertinent portions are reprinted at A33-A36.

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 to address questions raised under 42 U.S.C. §§ 1981, 1983, and 12112 and the Fourteenth Amendment, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to address the state law claims.

INTRODUCTION

This case presents two issues in ferment within the federal court system which are substantial in nature and which are receiving different treatment in differing circuits.

One issue involves 42 U.S.C. § 1981, which was amended in 1991: Where there is a continuing pattern of discrimination, beginning before the amendment and continuing after the amendment, should the pre-amendment conduct be admissible in proving a continuing offense? In approving a grant of summary judgment, the Sixth Circuit answered in the negative.

The other issue involves the Americans with Disabilities Act: Does an employer have a duty to interact with an employee in an attempt to find a reasonable accommodation? In approving a grant of summary judgment, the Sixth Circuit again appears to have answered in the negative.

STATEMENT OF THE CASE

S. August Fasone, who is of Italian ancestry, filed this action on April 23, 1993, against Clinton Township, Ohio. His Third Amended Complaint, filed May 19, 1994, alleged, *inter alia*, ethnic and disability discrimination under 42 U.S.C. §§ 1981, 1983, and 12111 (the Americans with Disabilities Act) and under Ohio law.

Following a period as a volunteer firefighter, Mr. Fasone was hired as a full-time firefighter on April 12, 1982. A37. His job duties included fire suppression, paramedic services, and the use of other skills customarily associated with firefighting. In 1992, during the normal course of performing his job, Mr. Fasone suffered injuries which ultimately necessitated hip replacement surgery. A13-A14. As a result, he is unable to perform all of the full duties of a firefighter, but his physician stated that he could engage in light duty firefighting, such as office work or serving as a fire prevention officer, conducting building inspections and issuing permits. A44.

Ethnic Discrimination Under 42 U.S.C. § 1981

From 1982, and even before that as a volunteer with the township fire department, Mr. Fasone, who is of Italian ancestry and who pronounces his name Fah-so-nee, was the object of a barrage of derogatory remarks directed at him mostly by supervisors and sometimes by his peers. These included denigration as an "ignorant Italian," "dago," "half-breed," A15, "WOP," and "sandblasted nigger," A46-A47, on an almost daily basis. He was told that he would never be promoted because an ignorant immigrant or ignorant Italian wouldn't be promoted to the rank of lieutenant. A38. All of this caused him to become and remain clinically depressed, and he entered psychotherapy for a substantial period of time – several years – in order to cope with the ethnic conflict. A39-A43. Following the filing of the Complaint and extensive discovery, the trial court granted summary judgment to the defendants on all counts, A12-A32, and denied Mr. Fasone's Motion to Alter or Amend Judgment. A5-A11. In granting summary judgment, the trial court refused to consider any evidence of discriminatory conduct occurring before November 21, 1991, when § 1981 was amended to include acts occurring in the course of employment. A26-A27 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994)). Although the claim of continuing conduct was presented to the Sixth Circuit, that court, without discussion of the issue, affirmed the holding of the district court in a cursory, unpublished opinion. A1-A4.

Mr. Fasone contends that, where there is a continuing pattern of discrimination, beginning before and continuing for after the amendment, pre-amendment conduct should be admissible in proving a continuing offense.

Discrimination Under the Americans with Disabilities Act

As an active firefighter for Clinton Township, Mr. Fasone's job definition was not limited to fire suppression, but included responsibilities of

> participating in fire prevention, station maintenance and training activities, perform[ing] other related duties or jobs as may, from time to time, be required.

A49. Aside from the suppression of fires and responding to emergency calls, the typical tasks of the firefighter position included checking, testing and maintenance of apparatus and equipment; assisting in maintaining the fire station grounds; making residential, commercial and industrial inspections; and educating the public in fire prevention. A49.

Clinton Township has historically allowed injured firefighters to work with modified or restructured work duties, performing fire and safety inspections, reviewing paperwork, and engaging in other functions that are within the firefighter's job description. A52, A55-A56. This type of restructure has occurred where firefighters "were incapable of performing their normal duty position task." A55.

This traditional approach of accommodating the disabilities of injured firefighters was rejected when it came to Mr. Fasone. Following further injury to his hip in 1992, Mr. Fasone requested on numerous occasions that he be allowed to have his duties restructured or modified. These requests were denied. A52, A56. During the same period of time, however, the position of Fire Protection Officer of Clinton Township was vacant yet fully funded, per the union contract. A52.

Randy Stickle became Fire Chief in late 1992. Mr. Stickle possesses strong opinions that firefighters should not be offered the accommodation of modified or restructured duties. In Mr. Stickle's deposition, he states:

> I believe that every member of the Clinton Township Division of Fire should pull his or her own weight to fight fire and to perform emergency services, and if they can't perform those services, then I'm not sure that I'm using the taxpayers' dollars effectively.

A63.

> As far as I am concerned there is no light duty in Clinton Township Division of Fire. In the past, I am aware of some light duty temporary assignments that were given prior to my appointment and the Fire Chief.

A67.

Chief Stickle repeatedly refused Mr. Fasone's requests for accommodation, and told Mr. Fasone that he was not going to pay for Mr. Fasone's injuries

for the next forty years. A52. However, Chief Stickle never investigated the feasibility of light duty at the Clinton Township Fire Department, explaining: "I didn't believe that light duty was an appropriate assignment in the fire service." A59.

Appellee Penny Pember was the oversight trustee for the fire department beginning in 1992, and acted as liaison between the Township Board of Trustees and the fire department. A70. Upon becoming the liaison trustee, Pember conducted no investigation of the policy surrounding job modification for firefighters. Nevertheless, Pember made the decision that this accommodation could not be made available and that firefighters who were disabled would not be accommodated with any form of job restriction, as they had been in the past. A71-A72.

While Chief Stickle and Trustee Pember have adamantly concluded that jobs cannot be restructured within the Fire Department, the facts indicate otherwise. As set forth above, this modification of job duties was historically provided to injured employees of Clinton Township. Even after Mr. Fasone's request was denied, Chief Stickle assigned an injured Lieutenant, Paul Stokes, to work only fire prevention duties following a non-work related injury. A72-A74. Stokes confirms that following a neck injury, he was assigned to work only as a fire prevention officer for the Fire Department, and performed no duties related to actual fire suppression. A74-A76.

By July, 1993, Mr. Fasone had depleted his personal leave time and was forced to retire from the Fire Department because no accommodation was made for him to return to work. A53. This was the same period of time that Clinton Township maintained the unfilled position of Fire Prevention Officer. The Fire Department continued to maintain this position within the Union contract and budget, but these duties were actually filled by firefighters who otherwise would have been riding with the fire company in the suppression of fires or with the EMS team. Although capable of performing these duties, Mr. Fasone was denied the opportunity to do so. A52-A53.

REASONS FOR GRANTING THE WRIT

The decision below, in affirming summary judgment granted by the district court, presents two federal questions of great importance: First, may evidence of discrimination occurring before the 1991 amendment of 42 U.S.C. § 1981 be considered in determining whether an employer has engaged in an ongoing pattern of discrimination? Second, does an employer have a duty to interact with an employee in an attempt to find a reasonable accommodation under the Americans with Disabilities Act? As both questions implicate a conflict of authority in the lower courts, involve important federal questions, and were incorrectly decided below, Mr. Fasone respectfully submits that the writ should be granted.

I. EVIDENCE OF DISCRIMINATION OCCURRING BEFORE THE 1991 AMENDMENT OF 42 U.S.C. § 1981 SHOULD BE CONSIDERED IN DETERMINING WHETHER AN EMPLOYER HAS ENGAGED IN AN ONGOING PATTERN OF DISCRIMINATION.

This case presents an important issue, now percolating in the federal courts, that was left unresolved by this Court's decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), namely, whether a plaintiff who alleges continuing and ongoing acts of discrimination occurring from the period prior to the enactment of the 1991 amendment to 42 U.S.C. § 1981 and continuing for a substantial period thereafter is entitled to present evidence of all such conduct in an action under the amended statute. In *Rivers*, this Court limited its holding against retroactive application to "cases pending when it was enacted." However, since that time, a number of federal courts around the country have addressed the issue of complaints filed after the amendment but alleging conduct both prior to and after the amendment.

In Mr. Fasone's case, the district court, for purposes of summary judgment, found: that there had been numerous anti-Italian derogatory remarks, including some after the enactment of the amendment to § 1981; that the slurs and insults were directed at Mr. Fasone by his peers and supervisors up to and including the fire chief; that he kept track of all of the insults and referred each to his supervisors; and that Mr. Fasone asserted that the problems were not remedied. A15-A16.

The district court, properly following this Court's dictum in *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 611-13 (1987), determined that Mr. Fasone had made a colorable claim that his Italian ancestry constituted a race as understood by the drafters of § 1981 and therefore would fall under that statute. A26. However, the district court specifically held that the Clinton Township Fire Department "can be held liable to Fasone only for acts of harassment that occurred after the effective date of the statute." A27. The post-1991 acts were fewer in number than the near-decade long barrage of similar acts that preceded the amendment of § 1981, and it is the unabated stream of acts which both constitutes the continuing conduct at the heart of the case and makes effects of the later ones all the more severe. In excluding pre-amendment conduct from consideration, even as evidence, the district court misread the holding of this Court in *Rivers*:

> The second problem with Fasone's claim, however, is fatal; Fasone has not produced evidence of a system of harassment so pervasive as to impinge upon the anti-discrimination laws. As discussed above, only acts that occurred after November 21, 1991 are actionable under § 1981. *Rivers*, 114 S. Ct. at 1519-20.

A28. The district court then properly noted that the harassing conduct had to be "sufficiently severe or pervasive" to alter the conditions of employment. A28 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). However, it then grounded its grant of summary judgment to the defendants on the section

1981 claim by limiting not only liability, but also evidence of the pervasiveness of the harassment, solely to acts occurring after November 21, 1991. A28.

A. The Sixth Circuit's Analysis Conflicts with Decisions of Other Circuits.

When this Court decided *Rivers*, it stated that it had granted certiorari "on the sole question whether [the 1991 amendment to § 1981] applies to cases pending when it was enacted." 511 U.S. at 303. It did not address cases in which there was a continuing course of conduct beginning prior to the 1991 amendment and continuing after it, as in the case at bar. The question simply was not before the Court. Thus, it was approached neither as a matter of statutory interpretation nor as an evidentiary issue.

The present case raises the issue of continuing course of conduct from both perspectives, and in so doing, it identifies an application of the Sixth Circuit that conflicts with decisions of the First and Eighth Circuits in § 1981 cases.

After the Sixth Circuit decided the case at bar, the Eighth Circuit issued an opinion in *White v. Honeywell*, 141 F.3d 1270 (8th Cir. 1998). In *White*, the plaintiff had filed claims under Title VII and § 1981. The district court limited her § 1981 claim "to acts occurring after November 21, 1991." *Id.* at 1272. She attempted to show a pattern of harassment from 1984 and continuing through 1992. With regard to Ms. White's § 1981 claim, the jury was limited to the special verdict issue "whether White was subject to a

racially hostile work environment between November 21, 1991 and June 24, 1992 [her last day of work before going on disability leave]." *Id.* at 1274. The Eighth Circuit noted that the trial court had barred some evidence of statements "not made during the actionable period of time." *Id.* at 1275. That court observed that hostile environment evidence " 'must not be compartmentalized, but must instead be based of the totality of circumstances of the entire hostile work environment.' " *Id.* (quoting *Delph v. Dr. Pepper Bottling Co. of Paragould*, 130 F.3d 349, 355 (8th Cir. 1997)). In that respect, the Circuit was applying the standards set forth by this Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), regarding the necessity of "looking at all the circumstances," *id.* at 23, and most recently reaffirmed by this Court in *Faragher v. City of Boca Raton*, 1998 WL 336322 (U.S.). The Eighth Circuit held that the barred evidence of conduct that occurred before the actionable period of time "would have helped White to demonstrate knowledge and an ongoing pattern of racial harassment." *White*, 141 F.3d at 1276. But in the present case, evidence from the pre-amendment period was excluded from consideration of the totality of circumstances. A27.

Another case arising within the Eighth Circuit, *Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010 (W.D. Mo. 1998), approaches the *Fasone* issue by examining the policy in, and interpretations of, § 1981 and the 1991 amendment. The district court began by observing that *Rivers* "applied to *pending cases* of preenactment conduct." *Id.* at 1016 (emphasis

added). The court then noted that *Rivers* and Eighth Circuit cases "do not address preenactment conduct that continued through November 21, 1991, the date Section 1981 was amended. In the present case, plaintiffs clearly allege discriminatory conduct that occurred before November 21, 1991, and continue to the present date." *Id.* The *Cunningham* court concluded that "because plaintiffs allege continuous and ongoing acts of discrimination occurring from the period prior to the enactment of the 1991 amendment into the present date, they are entitled to bring all such alleged conduct under the amended version of Section 1981." *Id.* at 1017.

Other district courts have come to like conclusions. *See Russell v. Overland Police Dept.*, 838 F. Supp. 1350 (E.D. Mo. 1993); *Boyce v. Dickinson County, Kan.*, 1994 WL 174021 (D. Kan. 1994).

In *Russell*, the district court found that

> when the alleged acts of . . . harassment and discrimination are alleged to have been ongoing and continuous into the period following the enactment of the Civil Rights Act of 1991, then plaintiff is entitled to a jury trial as to those claims, whether they occurred prior to the enactment of the Civil Rights Act of 1991 or thereafter.

838 F. Supp. at 1354. Likewise, in *Boyce* (a Title VII case), the court observed that

> not all relevant conduct occurred before November 21, 1991. . . . The relevant conduct is not merely that which occurred pre-

> Act but consists of ongoing conduct occurring both pre- and post-Act. This conduct cannot be distilled into a single pre-Act unit. Nor can it be fragmented into discrete units of pre- and post-Act conduct.

1994 WL 174021 (D. Kan. 1994) at 2.

In *DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir. 1997), the plaintiff, a white male of Italian descent, brought race and national origin discrimination claims under Title VII. The First Circuit considered his claim that he was "entitled to the remedies delineated in the Civil Rights Act of 1991 because his pre-Act and post-Act deprivation of duties were part of one continuing violation and the effects of his 'employment purgatory' extended beyond the effective date of the Act." *Id.* at 305. The First Circuit, noting this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), held that the 1991 act was not retroactive. However, the court examined the claim of continuing violation and invoked its earlier classification system, delineating "two types of continuing violation cases: systemic and serial." *Id.* at 307.

> A systemic violation usually "has its roots in a discriminatory policy or practice; so long as the policy or practice continues into the limitation period, a challenger may be deemed to have filed a timely complaint," even if he fails to show "an identifiable discrete act of discrimination transpiring within the period." . . . A serial violation "is composed of a number of discriminatory

> acts emanating from the same discriminatory animus, each act constituting a separate wrong. . . . "

Id. at 307 (quoting *Jensen v. Frank*, 912 F.2d 517, 522-23 (1st Cir. 1990)).

The First Circuit noted that the *DeNovellis* plaintiff did not claim a systemic violation. It then addressed his claim of a serial violation, concluding that he "did not seriously contest" the district court's finding that he had not presented evidence of post-Act discrimination. 124 F.3d at 308-09. In contrast, Mr. Fasone alleges both systemic and serial continuing violations, and he offered evidence to support them both. A15-A16. Moreover, Mr. DeNovellis pressed the First Circuit on a related theory – that of pre-Act conduct that became a "continuing violation through its continuing effects." 124 F.3d at 309. The First Circuit rejected Mr. DeNovellis's claim, holding that "continuing effects, without additional post-Act discriminatory actions, do not turn a discrete pre-Act decision into a continuing violation." *Id.* By contrast, in the case at bar, Mr. Fasone alleged and offered substantial evidence of both pre- and post-Act discriminatory conduct. A53.

B. The Sixth Circuit's Analysis Fails to Follow Decisions of this Court on Similar Issues.

This Court has already held that, with regard to statutes of limitation in civil rights cases, courts

should look to the issue of continuing violations. It has done so in the arena of fair housing, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and in Title VII cases. *United Air Lines v. Evans*, 431 U.S. 553 (1977).

In *Havens Realty*, this Court held that "a 'continuing violation' . . . should be treated differently from one discrete act of discrimination." 455 U.S. at 380. To ignore "the continuing nature of the . . . violation, only undermines the broad remedial intent of Congress embodied in the Act." *Id.* This Court found that "a continuing violation manifested in a number of incidents – including at least one . . . that is asserted to have occurred within the [limitation] period" was sufficient to bring all of the conduct within the purview of the statute. *Id.* at 381.

Moreover, the language in *United Air Lines* is relevant to the case at bar because, while the Court held that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed," the Court went on to hold that such acts could "constitute relevant background evidence in a proceeding in which the status of a *current* practice is at issue." 431 U.S. at 558 (emphasis added). The lower courts in Mr. Fasone's have refused to consider such evidence – even as background.

II. AN EMPLOYER HAS A DUTY TO INTERACT WITH AN EMPLOYEE IN AN ATTEMPT TO FIND A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT.

Genuine issues of material fact existed as to Clinton Township's failure to fulfill its duty to make reasonable accommodation for Mr. Fasone. F.R.Civ.P. 56. Mr. Fasone properly requested reasonable accommodation for his disability; Clinton Township did not even consider accommodation and failed to communicate with him regarding possible accommodations. The lower courts' acceptance of Clinton Township's conclusory assertions of undue hardship was an improper basis for summary judgment. Moreover, in failing to require the employer to interact with the employee in seeking an accommodation, the Sixth Circuit decision is in direct conflict with the position of other federal courts of appeal, including the Third, Fifth, and Seventh Circuits.

A. Summary Judgment in a Reasonable Accommodation Case Requires the Employer to Bear the Burden of Showing Undue Hardship.

To make out a prima facie case under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, an employee must be able to establish that he or she has a disability, is a qualified individual, and has suffered an adverse employment action because of that disability. If the employee requires a reasonable accommodation in order to perform the job, the

employer may rebut that prima facie case with a showing that making a reasonable accommodation for the employee's disability would cause it undue hardship. *See Stone v. City of Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998). The following threshold issues are undisputed: (1) that Mr. Fasone was disabled within the meaning of the ADA and (2) that Clinton Township terminated Mr. Fasone's employment because of his disability. A2. As Mr. Fasone made out his prima facie case and requested a reasonable accommodation, the only issue here was whether Clinton Township properly met its burden to show that there was no genuine issue of material fact on the question whether the accommodation would have created an undue hardship. It did not.

The lower courts summarily concluded that the accommodation requested by Mr. Fasone was unreasonable because it would have required the creation of a new position. The record does not support that conclusion, nor does the law. Clinton Township maintained an unfilled, funded position of Fire Protection Officer. A52. The duties of this unfilled position were placed upon other firefighters. A55. Indeed, the Fire Chief assigned someone to those duties after Mr. Fasone's request for accommodation was denied. A66.

It is certainly correct that an employer need not go to the extreme of creating a new and unnecessary job for an employee who, because of a disability, can no longer perform the necessary tasks of his or her job. This limitation is a sensible balance, recognizing

the practical limits of accommodation; however, it does not stretch so far as to allow characterization of any differences in responsibilities or functions to amount to the creation of a new position. Indeed, by definition, *every* accommodation will involve *some* change. Thus, "[t]he employer must be willing to *consider* making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) (emphasis added). Moreover, the ADA specifically includes reassignment as an option for a reasonable accommodation. 42 U.S.C. § 12111(9)(B). An employer is required to reassign a disabled employee if there is a vacant, funded position and the employee is capable of performing the essential elements of that position. *Shiring v. Runyon*, 90 F.3d 827, 832 (3d Cir. 1996).

In *Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998), the Court of Appeals for the Second Circuit reversed a grant of summary judgment in favor of a fire department that had refused to accommodate a firefighter who had been rendered a paraplegic in an off-duty accident. Like Mr. Fasone, Mr. Stone requested accommodation through assignment to non-firefighting duties, and like Clinton Township, the *Stone* defendants argued that even its non-firefighting personnel had to be ready to fight fires when necessary. The Second Circuit concluded that summary judgment was inappropriate:

> We in no way suggest that the essential duties of a firefighter do not normally include fighting fires. However, proper analysis of a claim under the federal disability statutes, must be focused on "the fundamental job duties *of the employment position the individual with a disability . . . desires*," 29 C.F.R. § 1630.2(n)(1) (emphasis added), rather than solely on the title held by a person occupying that position or the other positions occupied by most persons holding that title. . . .
>
> Second, the district court appears to have relied exclusively on the commissioner's opinion that the Department's capacity to fight multi-alarm fires would be unduly hampered by having assigned to [non-firefighting sections] a firefighter who could not engage in fire-suppression activity. While plainly the "employer's judgment as to which functions are essential," 29 C.F.R. § 1630.2(n)(3)(I), is highly relevant evidence, it is only one of the regulations' seven illustrative categories.

Id. at 99. Clinton Township has likewise failed to present sufficient evidence, other than its own unsupported conclusions, that accommodating Mr. Fasone's disability would create an undue hardship. Those conclusions, moreover, were suspect in light of Clinton Township's having had a fully-funded slot available for a full-time Fire Protection Officer. Moreover, modified duties have historically been made available to injured firefighters, even after Mr. Fasone requested the accommodation. A55, A58. The defendants' vague and conclusory statements that

accommodating Mr. Fasone would have been too expensive for its stretched budget fell far short of the burden required for summary judgment.

B. The Sixth Circuit's Affirmance Of Summary Judgment Conflicts with Other Circuits' Decisions that the ADA Requires an Employer to Engage in an Interactive Process.

The ADA is designed to encourage employers and their disabled employees to work together and to communicate meaningfully to try to find an accommodation. To that end, several federal courts of appeals have held that the ADA places upon employers the obligation to engage in an interactive process with the employee to determine whether a reasonable accommodation is possible. *See, e.g., Deane v. Pocono Medical Center*, 142 F.3d 138, 149 (3d Cir. 1998); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 677 (7th Cir. 1998); *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1012 (7th Cir. 1997); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 165 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 586 (1996); *Vande Zande*, 44 F.3d 538. As the Court of Appeals for the Third Circuit recently stated:

> In *Mengine* [*v. Runyon*, 114 F.3d 415 (3d Cir. 1997)], we highlighted the importance of communication and cooperation between employers and employees in seeking reasonable accommodations. Specifically, we noted that, in the context of the Rehabilitation Act, "both parties have a duty to assist in the

> search for appropriate reasonable accommodation and to act in good faith."

Deane v. Pocono Medical Center, 142 F.3d at 149 (quoting *Mengine*, 114 F.3d at 416, 420 (citations omitted)).[1]

In *Mengine v. Runyon*, 114 F.3d 415 (3d Cir. 1997), the court stated that

> both employer and employee must "make reasonable efforts" to help determine "what specific accommodations are necessary." *Beck* [*v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996)].
>
> . . . [B]oth parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith. In order to satisfy the requirements of the Rehabilitation Act, the Postal Service had the duty to make reasonable efforts to assist Mengine, to communicate with him in good faith, and to not impede his investigation. *See Beck*, 75 F.3d at 1135 ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."); *see also Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago*, 104

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[1] The Rehabilitation Act, not the ADA, was construed in *Deane*. However, "interpretations of the Rehabilitation Act's 'reasonable accommodation' provisions are relevant to [the] analysis of the ADA and vice versa because in 1992, Congress amended the section of the Rehabilitation Act defining 'reasonable accommodation' to incorporate the standards of the ADA." *Deane*, 142 F.3d at 149, fn. 13.

> F.3d 1004, 1012 (7th Cir. 1997) ("[D]etermining what specific actions should be taken by an employer requires an interactive process involving participation by both sides."); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (The "employee's initial request for an accommodation . . . triggers the employer's obligation to participate in the interactive process. . . . "), *cert. denied*, ___ U.S. ___, 117 S. Ct. 586, 136 L.Ed.2d 515 (1996).

Id. at 420.

As the Third Circuit concluded in *Deane*, "an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA." 142 F.3d at 149.

That is just what Clinton Township failed to do in Mr. Fasone's case, and the result is just what the Third Circuit warned. When Mr. Fasone's disability made it impossible for him to perform some of the tasks of firefighting, he requested assignment to the position of Fire Prevention Officer. This position had already been created and was fully funded, but was unfilled. A52. *See Mengine.* The duties of that position were performed *by firefighters.* And after Mr. Fasone's request was denied, the Fire Chief assigned someone else to those duties. A66.

But Clinton Township never even considered accommodating Mr. Fasone, investigating possibilities in which it might do so, or even discussing

the possibility with him. Appellee Pember candidly admitted that she did not even investigate the matter. A71-73. *See also* A67-A69. This failure to consider accommodation indicates bad faith on the part of Clinton Township, raising the inference of a pretext: "Bad faith in the interactive process necessarily suggests a desire not to accommodate an employee's disability, or to put it another way, suggests discriminatory animus," so that there is "consequentially an inference of pretext and intentional discrimination." *Valentine v. American Home Shield Corp.*, 939 F. Supp. 1376, 1401-02 (N.D. Iowa 1996). Because of Clinton Township's admitted failure to engage in the interactive process as required by *Deane* and other cases, the District Court's grant of summary judgment in this case was improper. The Sixth Circuit's opinion affirming that grant of summary judgment is in direct conflict with the position of the Third, Fifth, and Seventh Circuits, as set forth in, *inter alia*, *Deane*, *Taylor*, and *Dalton*.

CONCLUSION

For each of the foregoing reasons, and for all of them, the Petitioner respectfully submits that the Court should grant the writ in this case.

Respectfully submitted,

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July 2, 1998

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 97-3267

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUGUST FASONE, Plaintiff-Appellant, v. CLINTON TOWNSHIP, et al., Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed April 3, 1998)

Before: Merritt and Clay, Circuit Judges; and Bell,* District Judge.

MERRITT, Circuit Judge. Plaintiff August Fasone sued the Clinton Township and several of its employees alleging: (1) discrimination based on handicap in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112(a); (2) a hostile work environment based on his Italian heritage in violation of 42 U.S.C. § 1981 and Ohio Revised Code § 4112.02; and (3) a due process violation with respect to a five-day suspension. The District Court dismissed Fasone's case on summary judgment. We affirm.

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* The Honorable Robert Holmes Bell, United States District Court Judge for the Western District of Michigan, sitting by designation.

Fasone's handicap discrimination claim is without merit. A plaintiff who has suffered an adverse employment decision because the employer relief on the plaintiff's disability must show: (1) that he is a disabled person within the meaning of the Act; and (2) that he is "otherwise qualified" for the position despite his disability: (a) without accommodation; (b) with an alleged "essential" job requirement eliminated; or (c) with a proposed reasonable accommodation. *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996). There is no dispute that Fasone lost his job because his disability prevented him from accomplishing the duties of a firefighter. Fasone argued that the fire department could have made a reasonable accommodation by permitting him to work in the light duty job of fire prevention officer. However, Fasone was unable to rebut defendants' evidence that there was no vacant position of fire prevention officer. Thus, Fasone was actually requesting that the fire department create a new position for him. "[E]mployers are not required to create new positions for disabled employees in order to reasonably accommodate the disabled individual." *Monette*, 90 F.3d at 1187. Moreover, the position of fire prevention officer or fire inspector "would also be required to function as an on-company firefighter at anytime" (App. 97, affidavit of Fire Chief Slickle). Therefore, Fasone's proposed accommodation was not reasonable because it was based on speculation or hopes about what the city might do, not on the existence of a ready accommodation.

Fasone's claim that the fire department discriminated against him and created a hostile work environment because of his Italian ethnicity fails as well. Under federal

law, a plaintiff can prove that he was subject to a hostile work environment by showing "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). Ohio law also creates a claim for workplace harassment that interfered with the employee's work performance or created an intimidating or hostile environment. *Delaney v. Skyline Lodge, Inc.*, 642 N.E.2d 395 (Ohio Ct. App. 1994) (listing elements for workplace harassment claims). Although Fasone stated that he was subject to constant harassment, he was able to identify only a few specific discriminatory comments. The few comments were insufficient to establish a hostile work environment under either federal or Ohio law.

Fasone's claim that Clinton Township violated his right to due process by giving him a five-day suspension without a thorough hearing fails because Fasone has not proved that he had a protected property interest at stake in his suspension. During the period immediately before the suspension, Fasone was expending his accrued sick leave and knew that he could not return to work as a front-line firefighter. During the suspension, Fasone was not forced to expend his sick leave. Therefore, he received the five days of pay two months later, at the end of his leave period. The inconvenience that resulted from the delay was de minimus and does not require due process protection. *See Carter v. Western Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270 (6th Cir. 1985) (holding that a two-day suspension without pay involving a matter of routine discipline was a de minimus property deprivation not

deserving of due process protection); *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461 (6th Cir. 1988) (holding no due process violation for plaintiff who was demoted without a hearing but subsequently reinstated with full back pay).

Accordingly, we affirm the District Court's grant of summary judgment in favor of the defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

AUGUST FASONE,

Plaintiff,

v. Case No. C-2-93-420

CLINTON TOWNSHIP, et al.,

Defendants.

OPINION AND ORDER

(Filed Feb. 28, 1997)

On July 18, 1996, this Court issued an opinion granting summary judgment in favor of Clinton Township and the other defendants in this case. The Court entered judgment on July 23, 1996. Plaintiff August Fasone ("Fasone") asks this Court to alter that judgment or to give him relief from judgment under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure. For the reasons that follow, the Court **DENIES** the motion.

I. Standard of Review

Fasone's motion cites two standards of review. First, Fasone moves for this Court to alter its judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. This portion of the motion asks the Court to review and correct a manifest error of law. *See* 6A James Wm. Moore et al., *Moore's Federal Practice* ¶ 59.03 at p. 59-13 (2d ed. 1996) (Rule 59(e) motion falls within court's "plenary power over interlocutory motions").

Second, Fasone argues that his motion should be considered under Rules 60(b)(2) and (6). Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons:
>
> > (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> >
> > . . . or
> >
> > (6) any other reason justifying relief from the operation of the judgment.

Fasone argues that relief from judgment is necessary in this case because Fasone produced evidence – particularly, the depositions of Ronald Legg and defendant Peggy Pember – that repudiates the Court's judgment entered in this case. Fasone asserts that these depositions were not available before the Court entered judgment because the depositions were taken on July 2, 1996, about two weeks before the Court entered its summary judgment opinion.

Although Fasone cites two separate procedural rules, Fasone essentially seeks reconsideration of this Court's judgment. Motions for reconsideration serve a limited function – to correct manifest errors of law or fact or to present newly discovered evidence. *Publishers Resource, Inc. v. Walker-Davis Publishing, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). Motions for reconsideration should not introduce evidence that could have been adduced during the pendency of a summary judgment motion. *Id.; see also*

Hopper v. Euclid Maner Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). Accordingly, reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard earlier. *Caisse Nationale de Credit v. CBI Industries*, 90 F.3d 1264, 1270 (7th Cir. 1996).

Here, Fasone has not presented the Court with "newly acquired evidence" sufficient to satisfy the requirements of either Rules 59 or 60. The depositions of Legg and Pember were taken weeks before the Court entered its opinion on summary judgment, and the transcripts could have been available to the parties (and therefore the Court) well before judgment was entered. Fasone has not given any reason for his failure to submit this evidence as soon as it was available. Because Fasone has not presented evidence that was truly newly discovered, and because he has not cited new law, Fasone's motions for reconsideration are without merit.

II. Reconsideration of the Federal and State Handicap Discrimination Claims

Fasone's failure to come forward with "new evidence" or legal arguments is dispositive of his motions. However, a week after this Court entered judgment in this case, and before Fasone filed the instant motion for reconsideration, the Sixth Circuit announced a major opinion interpreting the Americans with Disabilities Act. In order to resolve Fasone's motion completely, the Court will briefly address the standards enunciated in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996).

In this Court's original opinion dated July 18, 1996, the Court concluded that Fasone satisfied his *prima facie* burden to show that a reasonable accommodation to his disability was possible because Clinton Township employed a light duty firefighter in the past. (Op. and Order dated July 18, 1996 at p. 11.) This Court then shifted the burden of production to the defendants to show that the proposed accommodation created an undue hardship. The Court concluded that the accommodation was an undue hardship as a matter of law because Fasone's proposed accommodation would have required Clinton Township to create a new light duty position where none existed. (*Id.* at pp. 12-13.)

In light of *Monette*, the Court reconsiders the framework that it used to analyze Fasone's arguments. Roger Monette was a customer service representative for Electronic Data Systems ("EDS") when a workplace injury rendered him unable to work. Monette received indefinite medical leave from EDS. When EDS refused to give Monette long term disability benefits, however, Monette's employment with EDS terminated. A month later, Monette returned to EDS and requested his old job. EDS could not give Monette his old job because it had already filled the position; instead, EDS put Monette on unpaid leave for thirty-seven days. When nothing opened up during that time, EDS terminated Monette.

Like the present case, *Monette* addressed the common situation where an employer is aware of an employee's disability and makes an employment decision based at least in part on the limitations imposed by the disability. In such a case, a burden-shifting analysis similar to the familiar framework of *McDonnell Douglas Corp. v. Green*,

411 U.S. 792, 802-3 (1973), applies. Under the *Monette* framework, a plaintiff employee bears the *prima facie* burden to show that he is disabled and that, with or without a reasonable accommodation, he is "otherwise qualified" for an existing position. *Monette*, 90 F.3d at 1186. The burden then shifts to the employer to produce evidence of a legitimate explanation for its decision not to place the plaintiff in that position. *Id.* If the employer satisfies this burden, the burden then shifts back to the plaintiff to show that the employer's proffered explanation is pretextual. *Id.* The ultimate burden of persuasion always remains with the employee. *Id.* at 1186-1187. The employer, meanwhile, may use "undue hardship" as an affirmative defense.

Fasone's claims fall short of *Monette*'s legal standards because an employee's *prima facie* burden under *Monette* is more substantial than the burden that this Court originally applied in this case. An employee has not met his *prima facie* burden, for example, where he requests indefinite leave until a position opens up or where he would require the employer to create a new position in order to accommodate his disability. *Id.* at 1187. By this standard, Fasone's proposed accommodations were unreasonable. The uncontradicted evidence presented on the motion for summary judgment was that Clinton Township does not employ a light duty firefighter because the regular front line firefighters perform all of the light duties during their down time at the fire station. (*See* Op. and Order dated July 18, 1996 at pp. 12-13.) Placing Fasone in a light duty firefighter role would, therefore, create a new position, an accommodation that is presumptively unreasonable. Here, where Fasone has not shown that financial

considerations make the creation of a light duty position possible, he has not carried his burden on summary judgment.

III. Reconsideration of the Federal and State Hostile Work Environment Claims

In addition to his failure to present evidence that is sufficient to satisfy the Sixth Circuit's standard for addressing ADA claims, Fasone has also failed to produce evidence sufficient to maintain his hostile work environment claims. Under *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993), a plaintiff can prove that he was subject to a hostile work environment by showing "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. Here, even with Fasone's "new" evidence, he has not adequately addressed *Harris*'s elements. Even assuming that Fasone's vague description of "continuous" abuse can show that he was often the butt of fire station jokes, Fasone does not describe the conduct sufficiently to indicate that the abuse was based on Fasone's ethnic heritage. Indeed, although Fasone argues that the abuse was severe, he can list only four arguably ethnic epithets directed at him over a two year period, and he has not adduced evidence linking a physical assault to his ethnic heritage. Fasone has not shown that his work performance suffered as a result of the slurs that were directed towards him. Accordingly, the Court cannot alter the

judgment that it entered on Fasone's hostile work environment claims.

IV. Conclusion

Fasone's motions to alter judgment or for relief from judgment are based upon evidence that was available at the time that this Court issued its original opinion for summary judgment. Therefore, the motions are not well taken and are **DENIED**. Notwithstanding Fasone's failure to present a proper basis for reconsideration of this Court's prior decision, however, the Court has considered Fasone's additional evidence and arguments and concludes that Fasone's motions also fail as a matter of law. Under the new *Monette* standard for addressing ADA claims, Fasone has not satisfied his burden to show that a reasonable accommodation of his disability was possible. In addition, Fasone has not fulfilled the *Harris* requirements for proving a claim of hostile work environment.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

AUGUST FASONE, et al.,

Plaintiffs,

v. Case No. C-2-93-420

CLINTON TOWNSHIP, et al.,

Defendants.

OPINION AND ORDER

(Filed Jul. 23, 1996)

This matter is before the Court on the Defendants' motion for summary judgment on all of the Plaintiff's remaining claims. For the reasons that follow, the Court **GRANTS** the motion.

I.

Summary judgment is available in favor of a moving party when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of either submitting affidavits in support of its motion or pointing to unproven elements in the adverse party's claim. *Id.* Once the initial burden is fulfilled, the

> adverse [nonmoving] party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts that show that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e). If the nonmoving party presents evidence that is "merely colorable" or "not significantly probative," then summary judgment may be granted. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-250 (1986). Thus, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the ultimate burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In this posture, all of the nonmoving party's evidence must be believed and all reasonable inferences drawn in his favor. *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992).

In this case, however, the traditional rule of drawing inferences in favor of the nonmoving party has one slight twist: the Court will not find that an issue of material fact exists if the only basis for the question of fact arises from differences between statements made by a deponent at his deposition and statements made by the same deponent in a subsequent affidavit. *See Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315 (6th Cir. 1989).

II.

August Fasone ("Fasone") became a full time "front line" firefighter for the Clinton Township Fire Department ("CTFD") on April 12, 1982. In the CTFD, a firefighter is

> responsible for responding to fire alarms and other emergency calls to protect life and property, and for participating in fire prevention,

> station maintenance and training activities, performs [sic] other related duties or jobs as may, from time to time, be required.

(Personnel Procedures of CTFD § 600.00.) In Fasone's ten years as a firefighter, he performed duties that included physical exertion, such as fire suppression and paramedic services. His other duties included performing safety inspections and reviewing paperwork.

In 1991 and 1992, Fasone suffered a series of hip injuries that forced him to take time off from work, to ask the Fire Chief for light duty work, and even to pursue the possibility of collecting disability benefits. When the Fire Chief denied Fasone's request for light duty work, though, Fasone went back to work as a front line firefighter. In late 1992, Fasone suffered another injury and underwent hip replacement surgery. As a result of this surgery, Fasone cannot engage in activities that include lifting, bending, twisting, or prolonged standing; December 16, 1992 was his last day as a front line firefighter. Fasone used sick leave to extend his employment until 1993 and retired from the CTFD on June 29, 1993.

Today, although Fasone is completely disabled from his job as a front line firefighter, he can perform less strenuous job duties; he asserts that he could, for example, fill the role of a "light duty" firefighter, who would handle office work but not respond to emergency calls, or serve as a fire prevention officer, whose job it is to conduct building inspections and issue permits. The CTFD has, in the past, assigned firefighters to temporary light duty positions and has also employed a full time fire prevention officer. The CTFD refused, however, to place Fasone in either type of position.

After Fasone suffered his final hip injury and during the time that Fasone was on leave, Fire Chief Stickle, who replaced Fire Chief Mitchell in November 1992, told Fasone that he was under investigation for using a fire truck for personal business and asked Fasone for his side of the story. Fasone later received a written notice of an impending disciplinary hearing. Fasone brought an attorney to the hearing, which was held on February 18, 1993. At the hearing, however, Fasone was never afforded the opportunity to present his side of the facts or to present evidence in mitigation of his punishment. The CTFD found that Fasone used a fire truck for personal business, and further found that he obstructed the CTFD's investigation. As a result of these charges, Fasone was suspended without pay for five days. He did not have to use leave days during the suspension.

In addition to his problems at the end of his tenure, Fasone's experiences while a member of the CTFD were not pleasant ones, as he endured "countless" derogatory remarks directed at him by his peers on the squad. Some of these remarks were motivated by Fasone's half-Italian ancestry; for example, since 1991 he has been called an "ignorant Italian" and a "dago." According to one former firefighter, almost every member of the CTFD made jokes about Italians at one time or another. In addition, Fasone suffered insults directed at his religion ("no-account Catholic") and his parents' different ancestries ("half-breed"). Fasone attributes most of the derogatory comments directed at him to one man, Lieutenant Pat Stokes, but two other men, former Fire Chief Michael Mitchell and Lieutenant John Harris, also made these types of comments.

Fasone kept track of the insults directed at him in a calendar; he also referred each instance to his supervisors, including Fire Chief Mitchell and Trustee Larry Wilkes. However, Fasone asserts that neither man remedied the problem. The cumulative effect of the slurs made Fasone feel "bitter" and like a "third-class citizen."

Based upon the foregoing facts, Fasone seeks relief from Clinton Township; John Frost, Larry Wilkes, and Penny Pember, who are all trustees of Clinton Township; Randy Stickle, the current Fire Chief of the CTFD; and Rebecca Christian, Clinton Township Clerk.[1] Fasone claims relief on several separate theories. First, he claims that his suspension from the CTFD was without due process of law because he was denied a postdeprivation hearing; this claim is brought under 42 U.S.C. § 1983. Second, Fasone claims that the CTFD discriminated against him on the basis of his handicap in violation of both federal and state law when it refused to reasonably

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[1] The Court is somewhat puzzled as to which theories Fasone is pursuing against which Defendants. Fasone's third amended complaint, his most recent, captions "Clinton Township, et al." as the Defendants. In that complaint, Fasone refers by name to Defendants John Frost, Larry Wilkes, Penny Pember, and Randy Stickle, but he does not identify any particular conduct by these persons that falls within the scope of his claims. Defendant Rebecca Christian, meanwhile, is mentioned in several depositions and exhibits but, to the best of the Court's observation, is not mentioned in any of the parties' pleadings. Nevertheless, because the Defendants have retained joint counsel and because they jointly submitted their motion for summary judgment, the Court will consider this motion as to all Defendants. Moreover, unless otherwise noted, the Court will refer to the Defendants collectively as "the CTFD."

accommodate his physical impairment by assigning him to light duty work or to duty as a fire prevention officer. Third, Fasone claims that he was discriminated against by the CTFD on the basis of his Italian-American heritage in violation of 42 U.S.C. § 1981 and state civil rights law.

III.

A. Procedural Due Process Claim

Fasone's first claim is that Clinton Township violated his constitutional right to due process by giving him a five day suspension without a thorough hearing on the suspension. This constitutional tort claim, which is brought under 42 U.S.C. § 1983, requires Fasone to show that he had a protected constitutional right and that the CTFD violated that right. *See Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992). Because Fasone's particular allegations involve due process, Fasone must first show that he had a legally protectable interest that entitled him to due process. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). Here, although Fasone could presumably allege that he has either a protectable property interest or liberty interest at stake in his suspension, this Court concludes that he had neither and therefore that he had no actionable right to due process in the events surrounding his suspension.

Fasone asserts that he had a property interest at stake at the time of his suspension because "he would have been compensated during the time [of the suspension] but because of the . . . suspension he received no compensation during the five day period." (Mem. Opp. D.'s Mot. for Summ. J. at 18.) The Sixth Circuit has held that five-

day suspensions from work can qualify as protected property interests. *See Boals v. Gray*, 775 F.2d 686, 689 n.5 (6th Cir. 1985) (addressing a five day suspension comprised of separate two and three day suspensions). This case, however, does not involve a typical five day suspension; unlike the regular government employee who has a property interest in his job, Fasone was on leave at the time of his suspension, knew that he would not be able to return to work as a front line firefighter, and had informed the CTFD of his condition. He was merely expending his accrued sick leave. The CTFD, meanwhile, did not force Fasone to expend his sick days during his suspension period, and did not permanently withhold any wages; Fasone's wages for the five day period were merely delayed from the time of his suspension until the end of his leave period two months later. Thus, the property interest involved in this case is similar to the interest involved in a case in which an employee is suspended without due process but is subsequently reinstated with full backpay. *Cf. Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 467 (6th Cir. 1988). In either case, there is no permanent loss of wages and, accordingly, only a *de minimis* loss of property. No cognizable property interest is affected by the employer's actions.

In addition to the property interest that this Court holds to be *de minimis*, Fasone's pleadings suggest that he believes that he suffered an injury to a protected liberty interest because the incomplete process afforded him by the CTFD harmed his reputation. Like Fasone's asserted property interest, however, this claim fails. The Supreme Court has declared that injuries to reputation alone are not enough to create a need for due process. *Paul v. Davis*,

424 U.S. 693, 710-711 (1976); *see also Mertik v. Blalock*, 983 F.2d 1353, 1362 (6th Cir. 1993). Fasone has not asserted that any harm to his reputation spread further. Fasone has not, for example, asserted that his suspension has caused a stain on his resume or hindered his job search. In fact, Fasone has not sought new employment of any kind since his suspension. Moreover, and as discussed above, any property interest affected by the suspension was minimal. Therefore, this Court concludes that Fasone has not alleged a sufficient liberty interest to give rise to due process protection. Because Fasone was similarly deficient in his burden to allege an injury to a property interest, this Court GRANTS the Defendants' motion for summary judgment on Fasone's § 1983 claim.

B. Discrimination on the Basis of Handicap

Fasone's second set of claims is that the CTFD discriminated against him on the basis of his physical impairment by not placing him in a permanent light duty position. For the reasons that follow, the Court concludes that these claims are without merit.

1. Federal Claim

Under the Americans with Disabilities Act, discrimination on the basis of handicap occurs when an employer fails to make "reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A). Fasone asserts, and this Court concurs, that an inquiry into the reasonableness of an

employer's accommodation of a disabled employee is an individualized one that must turn on the circumstances of the individual employer and employee. *See Hall v. United States Postal Service*, 857 F.2d 1073, 1078-1079 (6th Cir. 1988) (under the Rehabilitation Act). The need for an individualized inquiry, however, does not foreclose the appropriateness of summary judgment when as a matter of law no reasonable accommodation is possible. *See Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996).

On a defense motion for summary judgment, ADA claims involve the same shifting-burden test that is used in Title VII disparate treatment cases. *See Blankenship v. Martin Marietta Energy Systems*, 83 F.3d 153, 154 (6th Cir. 1996) (listing elements of a prima facie case as (1) disability; (2) adverse action by the employer because of the disability; and (3) ability to perform "essential functions" of the job with reasonable accommodations). First, the handicapped individual must make a prima facie showing that he has faced adverse employment action even though he is a "qualified individual with a disability." 42 U.S.C. § 12212(b)(5)(A); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249-50 (6th Cir. 1985) (discussing Rehabilitation Act). A "qualified individual with a disability" is one who, with or without reasonable accommodation, can fulfill the essential qualifications of the job. 42 U.S.C. § 12111(8). A reasonable accommodation can include "job restructuring" or "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). After identifying an accommodation that could have been made, an otherwise qualified employee must show that the proffered accommodation is reasonable "in the sense both of efficacious[ness] and of proportion[ ] to costs." *Vande Zande*

v. State of Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (identifying separate meanings for the statutory terms "reasonable" and "undue hardship"). Thus, in addition to showing that an accommodation is physically possible, a plaintiff under the ADA has some minimal burden to show that the proposed accommodation is economically tenable.

Once the plaintiff makes his prima facie showing, the defendant employer must demonstrate that the established criteria for a job are related to the essential functions of the job and that altering the conditions would cause that employer to suffer an undue hardship. *Jasany*, 755 F.2d at 1250. An accommodation imposes an "undue hardship" when the costs of the accommodation are excessive "in relation either to the benefits of the accommodation or the employer's financial survival or health." *Id.*; *see also* 42 U.S.C. § 12111(10)(B) (factors to be considered in determining whether an accommodation imposes an undue hardship). The plaintiff then has the opportunity to produce evidence refuting the employer's proffered explanation and evidence. The Court considers each of these stages in turn.

Fasone has met his prima facie burden. Clinton Township does not contest, at least at this stage of the proceedings, that Fasone is an individual with a disability within the definition of the Act. *See Taylor v. United States Postal Service*, 946 F.2d 1214, 1217-18 (6th Cir. 1991) (handicapped individual is one who has physical impairment that limits a major life activity). Moreover, because Fasone has limited his claim to his belief that he was entitled to a "light duty" position, Fasone need not show

that he was qualified for the position of front line firefighter, and the CTFD apparently does not contest that Fasone is qualified for permanent light duty or fire prevention work. In addition, Fasone has put forth evidence suggesting that the CTFD has light duty work that must be done, that the CTFD has, on occasion, assigned people to temporary light duty, and that the CTFD even used to have a permanent fire prevention officer, a role that Fasone could fill. As a result of these showings, Fasone has fulfilled his prima facie burden to show that he is a qualified individual who can be accommodated by assigning him to duties that are currently within the purview of others in the CTFD.

The burden now shifts to the CTFD to return with a showing that the accommodation suggested by Fasone would cause the CTFD to suffer undue hardship. The CTFD has met this burden. The following facts are undisputed: (1) the CTFD has not had a full time fire prevention officer since 1991; (2) since 1992, the duties of the fire prevention officer have been handled by a full time front line firefighter in conjunction with his other front line duties; (3) the CTFD has never provided a permanent light duty position to a firefighter; (4) since 1991, revenue in Clinton Township has declined because businesses in the township have closed; (5) the lower revenues for the township have resulted in lower allocations for the CTFD; (6) since 1993, the CTFD has closed one of its two fire stations and reduced its payroll from sixteen full time and twelve part time firefighters to eight full time and twenty part time firefighters; and (7) the reduction in the number of firefighters was a response to the increasing costs of maintaining the force, and in particular to the

cost of the benefit package given to full time firefighters. Based on these undisputed facts, the Court concludes that the CTFD did not have an open position available at the time that Fasone says that the CTFD should have given him a fire prevention or light duty post. The CTFD could not have reassigned him to a vacant position to accommodate his disability.

In addition, the Court concludes that the CTFD could not have reconfigured its work duties to allow for a light duty position without suffering undue hardship because duties within the CTFD are currently configured so as to maximize fire protection while minimizing cost to the township. A firefighter must spend twenty-four consecutive hours at the fire station. During this time, the firefighter has office duties to perform between 8:00 a.m. and 5:00 p.m. The remainder of the day is basically free time for the firefighters, although the firefighters on duty must remain at the station prepared to respond to emergency calls throughout the twenty-four hour shift, including their daytime period of office duty. By arranging the work schedules in this manner – so that front line firefighters can do light duty work while they are on hand for emergency duty – the CTFD minimizes the number of firefighters necessary and therefore minimizes its budget. If the CTFD were to assign one employee to purely light duty work, it would not only have to create an entirely new position, but it would also lose some portion of the benefit of having its other employees doing office work while they wait for an emergency call. *Cf. School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 289 n.19 (1987) (duty to restructure job functions does not include duty to create new job); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379-80

(6th Cir. 1994) (no duty to add a new employee in order to accommodate religious beliefs); *Hall v. United States Postal Service*, 857 F.2d 1073, 1079 (6th Cir. 1988) (under Rehabilitation Act, elimination of an essential element of a job is not a reasonable accommodation). Based upon these facts, this Court concludes that no reasonable juror could find that Fasone's proposed accommodation – which would have the CTFD retaining him in a light duty capacity at a time when budgetary considerations were forcing it to reduce the number of front line firefighters on duty – could be accomplished without undue hardship. Fasone has not offered any evidence that tends to rebut the CTFD's argument and evidence, so Fasone must lose his ADA claim based upon the CTFD's failure to reasonably accommodate his disabilities.

Fasone's second argument under the ADA – that the CTFD discriminated against him on the basis of his disability by failing to consider him for a light duty post even though none was available – is similarly without merit. Although Fasone's argument arises squarely out of the policies behind the ADA and the desire to prevent employers from deciding *ab initio* that the handicapped are not able to meet the standards of "able" society, the argument creates a cause of action that is impossible to police and that results in no damages. Here, even if Fasone had come forth with some evidence showing that the CTFD never considered accommodating him – which he has not, because the only testimony on the record is that the cost of a light duty position was too high for Fasone to be retained in that capacity (Stickle Depo. at 62, 66, 84) – he still would not be able to produce evidence of damages that he suffered. In addition, Fasone's argument

virtually opens the door on imposing civil liability based only on bad thoughts, an area perilously close to encroaching upon the protections of the First Amendment. This Court has no reason to take that step in this case, and doubts that it would in others. The CTFD's motion for summary judgment on Fasone's ADA claim is **GRANTED.**

2. State Claim

In addition to his federal ADA claim, Fasone asserts that the CTFD violated his rights under Ohio anti-discrimination law. However, the Ohio laws parallel the federal ADA. *Wooten v. City of Columbus*, 91 Ohio App. 3d 326, 334-35 (1993). Ohio law even includes the shifting burden of proof structure for addressing a defendant's motion for summary judgment. *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm'n*, 61 Ohio St. 3d 607, 609-10 (1991). Accordingly, by concluding that the CTFD was entitled to judgment as a matter of law on Fasone's federal handicap discrimination claims, this Court almost necessarily concluded that Fasone's state claim for handicap discrimination under Ohio Revised Code § 4112.02 was without merit. Moreover, Fasone has not put forth, and this Court cannot find, precendent [sic] suggesting that § 4112.02 should be interpreted more broadly than the ADA in this case. The Court **GRANTS** the CTFD's motion for summary judgment on Fasone's § 4112.02 claim.

C. Discrimination on the Basis of Ethnicity

Fasone's next set of claims allege that he was discriminated against by the CTFD based upon his ethnicity as an Italian-American. The federal claim is brought under 42 U.S.C. § 1981 and the state claim under Ohio Revised Code §§ 4112.02 and 4112.99. Neither claim alleges that this discrimination cost Fasone his job with the CTFD; instead, Fasone's claims are based upon a workplace harassment theory of liability. The Court GRANTS the CTFD's motion for summary judgment on these claims.

1. Federal Claim

On its face, § 1981 guarantees all citizens rights equal to those given to "white persons"; however, white persons may seek protection under the section if they belong to an ethnic group that was considered a discrete race to the nineteenth century drafters of § 1981. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 612-13 (1987); *see also Bisciglia v. Kenosha Unified School Dist. No. 1*, 145 F.2d 223 (7th Cir. 1995) (Italians have colorable § 1981 claims). Accordingly, and as discussed in this Court's Opinion and Order of November 22, 1994, Fasone's claim under § 1981 is colorable because he asserts that he suffered workplace discrimination due to his Italian ancestry.

Similarly, even though the language of § 1981 only protects the right to "make and enforce contracts," § 101 of the Civil Rights Act of 1991 broadened the scope of making and enforcing contracts to include acts that occur

in the course of employment.[2] However, because a civil cause of action for workplace harassment did not arise until the passage of § 101 of the 1991 Act, only acts of workplace harassment that occurred after November 21, 1991 are actionable under § 1981. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 1519-20 (1994). Thus, the CTFD can be held liable to Fasone only for acts of harassment that occurred after the effective date of the statute.

The CTFD challenges Fasone's § 1981 claim on two grounds. First, even though § 1981 protects persons based on their ethnicity, the CTFD asserts that ethnicity still must be clearly distinguishable from "national origin" and must be recognizable and definable. According [sic] the CTFD, Fasone, whose father was born in Italy but whose mother was not of Italian ancestry, does not fit this requirement. Allowing persons to choose their own ethnic identity could, in some cases, permit persons to "opt in" to a protected group. This case, however, presents no such dangers. Fasone identifies himself as an Italian-American and pronounces his name FAS-O-NEE in recognition of his Italian ancestry. Moreover, some of the statements identified by Fasone as discriminatory – for example, that he is a "dago" – are clearly of an ethnic

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[2] Specifically, § 101 of the Civil Rights Act of 1991 added subsection (b) to 42 U.S.C. § 1981. Subsection (b) reads:

> For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

nature. Thus, this is a claim for ethnic harassment within the scope of § 1981.

The second problem with Fasone's claim, however, is fatal; Fasone has not produced evidence of a system of harassment so pervasive as to impinge upon the anti-discrimination laws. As discussed above, only acts that occurred after November 21, 1991 are actionable under § 1981. *Rivers*, 114 S.Ct. at 1519-20. Moreover, in order to be actionable, harassing conduct must be "sufficiently severe or pervasive" to alter the conditions of employment. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (addressing Title VII sexual harassment claims); *see also Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1981) (upholding factual finding that occasional "conversational" use of the words "dago" and "Mafia" was insufficient to be actionable under Title VII or § 1981). Fasone has not produced evidence of a pervasive or employment-altering level of harassment after November 1991. Indeed, Fasone can identify only two particular post-1991 instances of ethnic slurs directed at him – once when he was called an "ignorant Italian" and once when he was referred to as a "dago." These two instances, which occurred over a one-and-a-half year span, are not enough to make a work environment hostile. The addition of two more slurs, "half-breed" and "no-account Catholic," even if a juror could infer that they were based upon Fasone's ethnicity, are not enough to make the harassment pervasive.[3] Moreover, Fasone's

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[3] Fasone's catalog of the slurs directed against him puts only the "no-account Catholic" remark within the period during which ethnic statements have been actionable under § 1981. The

conclusory statement that he suffered "countless jokes" and "abuse" on a "daily" basis and the supporting affidavit from Ron Legg are too vague and ambiguous to survive summary judgment, particularly when at least thirteen of the seventeen specific "discriminatory" statements set forth by Fasone, though reprehensible, were not aimed at his ethnic heritage. Accordingly, this Court **GRANTS** the Defendants' claim for summary judgment against Fasone on his claim of discrimination in violation of 42 U.S.C. § 1981.

2. State Claim

The final claim that this Court must address is Fasone's claim that he was discriminated against on the basis of his ethnicity in violation of Ohio law. Unlike Fasone's § 1981 claim, this claim is based upon the broad antidiscrimination provisions that were present in Ohio Rev. Code § 4112.02(A) from the beginning, and not upon the recent amendments to the scope of 42 U.S.C. § 1981's protection of contract rights; accordingly, all of the harassing incidents that occurred during Fasone's employment are potentially includable in his state claim.

Under Ohio law, a plaintiff-employee's claim for workplace harassment must show the following elements: (1) that the employee is a member of a protected class; (2) that the employee was subjected to unwanted harassment; (3) that the harassment was based upon the

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Court, however, has included all of the statements that Fasone alleges were directed at him from both 1991 and 1992 in its analysis.

employee's status as a member of a protected class; (4) that the harassment interfered with the employee's work performance or created an intimidating or hostile environment; and (5) that the employer is responsible for the acts of the harassers. *Delaney v. Skyline Lodge, Inc.*, 95 Ohio App. 3d 264 (1994) (sexual harassment). In the present case, Fasone has fulfilled the first and fifth of these elements easily; he identifies himself as an Italian-American and he alleges both that his superiors, Lieutenants Harris and Stokes, harassed him and that the top management of the township, including Fire Chief Mitchell, Fire Chief Stickle, and the Township Board of Trustees, knew about all of the harassment that occurred. Moreover, the Court accepts as true the second and third elements of workplace harassment because Fasone can identify specific incidents of harassing conduct and because some of the alleged harassment was based specifically upon his identity as a member of a protected class. The main issue for adjudication, therefore, is whether the incidents alleged by Fasone, when combined with Fasone's broad statements of "daily" harassment, are enough for a reasonable juror to infer that the harassment altered the conditions of his employment by creating a hostile work environment.

This Court concludes that Fasone has not presented facts which, if believed, are sufficient for a reasonable juror to conclude that Fasone suffered from a workplace so contaminated by harassment that the conditions of his employment changed. Fasone's allegations concerning his coworkers' harassing behavior can be divided into three different time periods. First, Fasone was subject to harassment from members of the CTFD while he was

only a volunteer firefighter for the township. These incidents, which included references to Fasone's "Italian temper" and the term "whop," were obviously the most severe. (*See* Fasone Depo. at 85-86.) However, because Fasone was only a volunteer at the time and because the slurs slowed afterwards, these incidents are not part of the same course of conduct as the later incidents. Second, Fasone was subject to harassment on the basis of his ethnicity from 1982, when he was hired as a full time front line firefighter, until 1986. Fasone does not remember specific instances from this period, but he did pursue administrative and civil means to stop the harassment and was able to do so in 1986. (Fasone Depo. at 91-92.)

The third and, for the purposes of this claim, most important period of harassment against Fasone is between 1986, when Fasone sought remedies against his harassers, and the present. Fasone asserts that he suffered greatly during this period at the hands of both then-Lieutenant Harris and current Lieutenant Stokes. These two men, say Fasone, critiqued his every mistake and hounded him for his use of leave time. Fasone cannot, however, specifically identify more than one statement – a reference to Fasone as a "faggot Italian" – that occurred before 1991. (*See* Fasone Depo. at 92-99.) The incidents that Fasone recalls during and after 1991 are discussed above.

Based upon the record in this case, the Court concludes that Fasone was harassed by various members of the CTFD and that he may have been harassed severely. The Court cannot conclude, however, that the harassment of Fasone – at least not the harassment attributable to the antipathy that various members of the CTFD may have

had toward Italians – was sufficient to allow a reasonable juror to find that the harassment altered the conditions of Fasone's employment to such a degree that it is actionable. This is particularly true because Fasone's only asserted harm is "bitterness." Fasone's state claim is **DISMISSED.**

IV.

The Court has reviewed the record and, even after taking all of the Plaintiff's statements as true and making all reasonable inferences in his favor, concludes that there are no remaining issues of material fact and that the Defendants are entitled to judgment as a matter of law. Therefore, upon consideration and being duly advised, the Court **GRANTS** the Defendants' motion for summary judgment as to all remaining counts of Fasone's third amended complaint. This case is terminated.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

42 U.S.C. §§ 1981, 12111 and 12112 (excerpt)

42 U.S.C. § 1981. Equal rights under the law.

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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42 U.S.C.A. § 12111. Definitions.

As used in this subchapter:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential

functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10 Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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42 U.S.C.A. § 12112. Discrimination.

(A) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures,

the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

* * *

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant

* * *

Deposition of Fasone (excerpt)

[p. 24] is that correct?

A. No, I didn't.

Q. Just for the sake of the record, I want to get your work history straight. You began full time at Clinton Township Fire Department on April 12, 1982; is that correct?

A. Yes.

Q. Prior to that you worked for a few years as a volunteer fireman?

A. Yes.

Q. So your actual work as a fireman was April 12, 1982 to December 16, 1992?

A. No, that's not correct. It is to the date I retired.

Q. Okay. But your actual dates of –

A. Physical labor.

Q. – physical service were April 12, 1982 to December 16, 1992?

A. Yes.

Q. Your date of retirement was June of 1993?

A. Yes.

Q. Who was –

A. I think the actual date that it started was July 5th or 6th or 7th.

Q. Your retirement was effective a week later?

* * *

[p. 97] Q. What do you mean by constant aggravation and hostility?

A. Just constant harassment.

Q. What do you mean by that?

A. What do you mean by it? What do you think it means?

Q. Fortunately I am not the one being deposed here.

MR. MATHEWSON: Off the record. Let me talk to you.

(Recess taken.)

Q. (By Mr. Jennings) Hostile environment, you know that as a legal term?

A. I didn't understand.

Q. Is it just something you made up?

A. No, it is not something I made up. What I meant by a hostile environment, I was called ignorant, ignorant dago, ignorant Italian. Mr. Stokes advised me since he was on the board, him and Harris, to be interviewed for promotions, they would never promote an ignorant immigrant or ignorant Italian to the rank of lieutenant.

Q. When did Mr. Stokes say that?

A. I think it is in there.

Q. Is it one of your things that is listed in

* * *

[p. 149] Q. Let's talk about those. What depression has this caused you?

A. Just being treated like a third-class citizen.

Being – you don't feel you are good enough.

Q. Same with mental anguish, similar thing?

A. Uh-huh.

Q. Depression, mental anguish, resentful, those are all kind of interrelated.

A. Uh-huh.

Q. Would that be correct?

A. Correct.

Q. You mentioned something about a psychiatrist. Do you have a psychiatrist?

A. Yes.

Q. Who is that?

A. John Mason.

Q. When did you first see Mr. Mason?

A. The first time I was suspended the township ordered me to see him. That was the township's psychologist.

Q. That was in 1986?

A. Whenever the first time I was suspended.

Q. It was after your altercation with the pedestrian?

A. Correct.

[p. 150] Q. Have you seen him since then?

A. Yes.

Q. When was the next time you saw him after 1986?

A. It was continuous.

Q. You have seen him continuously since 1986?

A. Yes.

Q. And how often do you see Mr. Mason?

A. Once – sometimes once a week, sometimes once every two weeks.

Q. And you still see him today?

A. Yes.

Q. Is he the only psychiatrist you have seen?

A. No, the police and firemen's pension sent me to one of their psychologists.

Q. But you have been treating with Mr. John Mason since 1986?

A. Correct.

Q. And you have continued to see him on a weekly basis?

A. Biweekly or weekly, whatever he prefers.

Q. Are you alleging that Mr. Mason has given you treatment for anything related to this lawsuit?

A. He has been treating me for the abuse that I received and the conflicts that I received from [p. 151] Clinton Township and their employees.

Q. When did he first treat you for that?

A. When I went to him for the incident.

Q. What incident?

A. That I had with the pedestrian.

Q. No, I'm sorry, when has he first treated you for anything that you relate to ethnic slurs?

A. About the same time, about a week after.

Q. Your testimony is that he has treated you for your feelings about ethnic slurs since 1986?

A. Yes.

Q. And on a continuing basis since 1986?

A. Yes.

Q. What else has he treated you for?

A. Conduct of the fire department, retiring.

Q. He's treated you to help you cope with your retirement?

A. Yes.

Q. Has he treated you to help you cope with physical ailments and injuries you have had?

A. He's a psychologist. I mean, how is he going to treat me for injuries to my body?

Q. Being able to cope mentally with those handicaps.

A. Yes.

[p. 152] Q. He has treated you for that?

A. Yes.

Q. Has he treated you for anything else?

A. No.

Q. Just for the record, if he is claiming treatment because of anything that you relate to this lawsuit, I would like copies of those medical records.

Has he treated you for anything else?

A. Fire related?

Q. Yeah.

A. No.

Q. Your testimony is he hasn't treated you for anything that is not fire related?

A. We talk about family problems but that is not a treatment, it is not an issue.

Q. Right. Treatment for family problems obviously my clients aren't responsible for that.

A. So what's your question?

Q. Let me ask that in question form. Isn't it correct your discussions with Mr. Mason about family problems aren't my client's responsibility in this lawsuit?

A. That's correct.

Q. Okay. What other things has he treated you for that my clients are responsible?

* * *

Exhibit 2

Affidavit Of David K. Halley, M.D.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

August Fasone, et al., Plaintiffs,	CASE NO. C2-93-420
vs.	Judge Kinneary
Clinton Township, et al., Defendants.	Magistrate Judge King

AFFIDAVIT BY DR. DAVID K. HALLEY

First being duly sworn and cautioned hereby states as follows: Mr. Fasone presented to me in my office on November 13, 1992, with the complaint of pain in his right hip. At the time Mr. Fasone was rated an A334 on the Charnley Scale and had limited motion and some spasms. At that time Mr. Fasone was disabled from his profession as a firefighter. Mr. Fasone was not helpless or immobile, but was permanently disabled until the completion of surgery. It was my impression that after surgery to Mr. Fasone's right hip he would have a disability period of 3 to 4 months at which time he would be able to return to another type of job, but never as a firefighter performing his front line firefighting duties. My recommendation at the time was that Mr. Fasone should be retrained so that he could perform duties in a new position in which no lifting, bending, twisting, or prolonged standing was required. It was my impression as of November 13, 1992, that Mr. Fasone was permanently and

totally disabled from being a frontline firefighter. Mr. Fasone would have been perfectly capable of performing duties such as, fire inspection, arson investigation, arson investigation, or clerical work.

Further affiant sayeth not

/s/ David K. Halley, M.D.

Sworn to before me and subscribed in my presence this 13th day of February, 1996.

/s/ Martin E. Batross
Notary Public

Martin E. Batross,
Attorney-At-Law
NOTARY PUBLIC -
STATE OF OHIO
MY COMMISSION HAS
NO EXPIRATION DATE
Section 147.03 R.C.

Deposition of Ronald Legg (excerpt)

* * *

[p. 22] regarding some things that you had testified to with Mr. Jennings.

Mr. Jennings asked you whether you remember any specific slurs from specific people, and you didn't have any recollection as to specifics of that; is that correct?

A. No specific slur to a specific person, specific time. As I was trying to tell the gentleman here, that it was an ongoing thing; that, you know, Gust was Italian, all that, even a gay person. Sorry, Gus. Wop. That he was – I mean, around the firehouse, just things like that.

Q. You heard wop referred to as Mr. Fasone; is that correct?

A. I heard a number of different things.

Q. That is one of the things you heard?

A. Yes.

Q. Did you ever hear the term sandblasted nigger?

A. I have heard that.

MR. JENNINGS: Objection. Move to strike.

Q. Was that in reference to Mr. Fasone?

A. I believe so.

MR. JENNINGS: Objection. Move to strike.

Q. Did you ever hear the term dago?

A. Yes.

[p. 23] MR. JENNINGS: Objection. Move to strike.

Q. Was that in relation to Mr. Fasone?

A. Yes, because Gust was the only Italian there at the time.

MR. JENNINGS: Objection. Move to strike.

Q. Did you work the same unit as Pat Stokes?

A. Yes, I did, worked with Pat.

Q. Do you recall whether Mr. Stokes was ever around at the same time as Mr. Fasone?

A. Yes.

Q. Do you recall Mr. Stokes ever acting in a derogatory manner in relation to Mr. Fasone's Italian ethnic?

MR. JENNINGS: Objection to the form of the question.

A. Pat was – he would say things to people. I don't remember exactly what it would be or whatever, but I am sure that things like that would have happened.

MR. JENNINGS: Objection. Move to strike.

Q. Do you make that statement based on personal knowledge of Mr. Stokes?

A. Yes.

Q. Mr. Stokes was a Lieutenant on the Fire Department; is that correct?

A. Yes, he was.

* * *

EXHIBIT 3

CHAPTER 6

PERSONNEL PROCEDURES

JOB DESCRIPTION – FIREFIGHTER

600.00 DEFINITION:

Under immediate supervision, is responsible for responding to fire alarms and other emergency calls to protect life and property, and for participating in fire prevention, station maintenance and training activities, performs other related duties or jobs as may, from time to time, be required.

600.02 TYPICAL TASKS: (Illustrative Only)

Responds to alarms and assists in the suppression of fires, including rescue, entry, ventilating and salvage work; after the fire has been extinguished, performs clean-up and over-haul work; checking, testing, and maintenance of apparatus and equipment to return it to readiness for further alarms.

Assists in maintaining fire apparatus and equipment and fire station grounds; responds to emergency calls; operates emergency medical equipment, administers first aid and other emergency medical service; assists in making residential, commercial, and industrial inspections to discover and eliminate potential fire hazards, to educate the public in fire prevention and to be prepared for fire suppression tactics.

Participates in continuing education and instruction programs by individual study of technical

material, and by attendance at scheduled drills and training classes.

When assigned, maintains passenger car used by the Fire Chief.

May serve as a Acting Lieutenant or an Inspector, if certified.

Responds to major alarms while off duty; when called. When assigned, acts as emergency squad leader.

600.04 EMPLOYMENT STANDARDS: (At time of filling out application)

Graduation from high school with a diploma or a certificate of equal value.

Must possess valid 200 hr. certificate, EMT-A card and a valid Ohio motor vehicle operators license.

General knowledge of elementary physics, chemistry, and mechanics; ability to learn technical fire fighting principles and techniques and principles of hydraulics applied to fire suppression, ability to understand and follow oral and written directions; ability to establish and maintain cooperative relationships with fellow employees and the public; ability to keep simple records and prepare reports; mechanical aptitude; physical endurance and agility.

EXHIBIT
1

Affidavit Of August Fasone (Excerpt)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

AUGUST FASONE,	:	
Plaintiff,	:	Case No. C2-93-420
v.	:	
CLINTON TOWNSHIP, et al.,	:	Judge Kinneary
Defendants.	:	Magistrate Judge King

AFFIDAVIT OF PLAINTIFF AUGUST FASONE

State of Ohio :
: ss.
County of Franklin :

I, August Fasone, being duly cautioned and sworn, hereby state the following facts:

1. I am the Plaintiff in this lawsuit and have first hand knowledge of the facts stated herein. All documents attached to the Memorandum in Opposition to Motion for Summary Judgment are true and accurate copies of the originals.

2. I am age 38, and was hired as a full time Firefighter for Clinton Township on April 12, 1982. My job duties included fire suppression, paramedic (EMS) services and the performance of other duties and skills associated with that of a Firefighter.

3. During my employment, I sustained injuries through the normal course of performing my job duties. These injuries included back and hip injuries. On the occasions when I was injured on duty, I provided notice of said injuries to my supervisors.

4. In 1992, I sustained further injury to my right hip. The injury necessitated care by my doctor, and eventual hip replacement surgery, and impaired my abilities to perform all of my job duties.

5. In 1992 and 1993, I requested on numerous occasions that I be allowed to work light duty or receive some other form of job restructure. Clinton Township has historically allowed injured firefighters to work light duty. My requests were denied. On one occasion, in denying my request, Chief Randy Stickle told me that he had no intention of paying for my injuries for the next forty years.

6. From 1991 on, Clinton Township maintained an unfilled position to Fire Prevention Officer. This position has been filled for over ten years by Carl Brandon. Mr. Brandon eventually left his Job and was never replaced. Although the job was never filled permanently, the Fire Department maintained this position within the Union Contract and budget. The duties of the Fire Prevention Officer position were performed by Firefighters who otherwise would have been riding with the fire company in the suppression of fires or with the EMS team. The duties of Fire prevention Officer did not include the heavy labor which I was unable to perform. I am fully trained to perform the functions associated with that job.

7. By July, 1993, I had depleted all leaves available to me except for injury leave (because it was denied to me) and was forced to retire from the Fire Department due to my disability and the fact that no accommodation was made to me to allow me to return to work. At that time, I was capable of performing a position on the fire force that was essentially vacant.

8. Over the course of my employment with Clinton Township, I was forced to endure constant harassment regarding my ethnic identity. My name is pronounced FAS-O-NEE, highlighting my Italian ancestry and my identity as an Italian American.

9. The ethnic harassment that I received was a daily circumstances [sic], received from both my co-workers and supervisors on a constant basis. Given the fact that I had complained on various occasions, without stopping the persecution, I considered that putting up [sic] the ethnic abuse was a term and condition of my being employed by Clinton Township.

10. The abuse I received was squarely directed at my ethnic background. This ongoing harassment included the following statements made to me by my own supervisors: That I was an ignorant Italian; That Clinton Township employees its [sic] token minorities, a nigger and a dago; That I am a no-account catholic; That I was a half-breed (apparently because only one of my parents is Italian). These are just examples of the daily slurs and insults directed at me.

11. I was subjected to countless jokes in which Italian bashing was the sum and substance. I was subjected to this type of abuse on a daily basis simply because I am

identified as an Italian. I was forced to seek psychological counselling as a result of this abuse.

12. In 1993, I received a suspension from work without pay because it was alleged that I had driven a squad for personal business. I have first hand knowledge that this type of punishment was not handed down to other workers accused of the same type of infraction.

* * *

Deposition Of James A. Winters (Excerpt)

* * *

[p. 26] the BWC did kick in the payments for specific dates off, I do know that, but I'm not sure which injury date they went to. I think there were a couple different blocks that we took to the board, then they kicked them out.

Q. So when you were interim chief you were partially responsible for handling those claims?

A. To a limited extent, yes.

Q. Were you ever aware of a request that Gus made to be placed upon light duty?

A. Yes.

Q. What is light duty?

A. Light duty can be kind of defined as, for general purposes, office duties not connected with the firefighting or EMS work.

Q. And for what purpose are people placed on light duty?

A. In the past they have been placed on light duty when for underlying temporary reasons, you know, they were incapable of performing their normal duty position task. It was not granted, you know, across the board. It was, I would say, granted on an individual basis.

Q. And what factors were considered as to whether or not light duty would be granted to any particular individual?

A. Part of it was based on departmental need.

[p. 27] Q. What other factors?

A. Individual capabilities.

Q. What type of capabilities?

A. Specifically when my knee was damaged in 1982, I was working as a part-time dispatcher. Our full-time first shift dispatcher had a heart attack and prior to Garcia they allowed you to work in other departments of the township and that's where I was placed because they had a need and I could not perform those tasks of fire-fighter.

Q. Do you recall what action was taken on Gus's request for light duty when you were chief or interim chief?

A. The request was denied.

Q. And why was it denied?

A. As interim chief I know that I asked Ms. Pember, who was the fire department liaison trustee at the time, and the answer came back no. I do not recall a specific reason for denial.

Q. So the decision really was made by the Board of Township trustees and not by you as chief or interim chief?

A. As interim chief when you don't have full power you ask the people that hold the reins over you.

Q. And you don't recall that Mrs. Pember gave you [p. 28] any reasons? She said just no?

A. No, I do not recall a reason.

Q. Do you know, were other people granted light duty during that same period of time that Gus made a request?

A. No.

Q. Have people been granted light duty since then?

A. No.

Q. What's the last time you can recall that someone was granted light duty?

A. The last person that I can recall who was granted light duty was Doug Brown.

Q. And when was that?

A. And without having the records I can guess, and I'm guessing '90 or '91.

Q. And do you recall how long he was on light duty.

A. Again a guess, less than three weeks.

Q. And was that prior to your becoming interim chief?

A. That's correct.

Q. Now, incidents of people being placed on light duty, would that be entered in their personnel file?

A. I don't know.

Q. Was the denial of Mr. Fasone's request for

* * *

Deposition Of Randy Stickle (Excerpt)

* * *

[p. 23] A. Not within the fire department.

Q. Has the system manual been changed since you've been Chief?

A. Well, it was recently updated, yes.

Q. Did the 1990 system manual under which Mr. Fasone was employed contain specific provisions for a fire prevention position?

A. For an actual position, I'm not sure. I don't recall. It did have a section in it that addressed the issue of fire prevention, yes.

Q. Was anybody ever assigned to that position since you've been Chief?

A. Yes, sir.

Q. And who was that?

A. Assistant Chief Dick Fisher was assigned to handle fire prevention when I was hired in November of 1992. He retired in, I believe, late February, early March of 1993. At that time lieutenant Pat Stokes was assigned to fire prevention but he was assigned to fire prevention while he was still assigned to a 24-hour firefighter shift.

Q. So basically he had those duties in addition to those of a firefighter?

A. And an on company lieutenant, yes.

Q. Was Carl Brandon an employee during the time

* * *

[p. 28] A. Yes.

MR. JENNINGS: Again, I'm going to object as to the relevance of this time period, but you can ask away.

MR. MATHEWSON: Okay.

Q. Did you refer him to a physician?

A. No.

MR. JENNINGS: Same objection.

MR. MATHEWSON: Okay.

Q. Back to Mr. Fasone, do you recall him requesting light duty of you in November of 1992?

A. Mr. Fasone?

Q. Yes.

MR. JENNINGS: November of '92?

MR. MATHEWSON: Yes.

A. No.

Q. Or December of '92?

A. No.

Q. At the present time since you've been Chief?

A. Yes.

Q. And when was that?

A. February of '93.

Q. And what was your response to that?

A. I didn't believe that light duty was an appropriate assignment in the fire service.

Q. Are all businesses in Clinton Township required

* * *

[p. 62] Q. What is your understanding of the concept of light duty?

A. Light duty in some organizations is a temporary assignment when the employee can't perform his full duties. This temporary assignment could include work that is more restrictive physically.

Q. Is that the definition that you applied to the request for light duty in this circumstance?

MR. JENNINGS: Objection. I think he just stated what he thought it generally was as opposed to some specific policy or definition of the Township, but you can answer.

A. My opinion is that the Township does not have the resources to have many people working light duty, and after discussions with Trustee Penny Pember decided it was in the best interest of the Township to not continue light duty as it had been in the past.

Q. What is your understanding as to what happened in the past prior to you coming?

A. I have no personal knowledge of that.

Q. My question is what is your understanding?

MR. JENNINGS: Objection.

A. I have no personal knowledge of that.

Q. Well, you just testified thirty seconds ago that you had an opinion that there were no resources to [p. 63] continue light duty after discussing with Penny Pember at least light duty as it happened in the past.

A. I'm aware that some –

Q. Let me ask you, do you know or do you have reason to know what happened in the past?

A. The only issues that I'm certain of is that there were some individuals within the fire department that had been granted light duty in the past. I don't know the specifics of the injury. I know that they were all temporary assignments and I don't know if anybody was accepted, denied, approved. I don't know the details.

Q. Did you ever inquire as to what the details were?

A. Brief discussion.

Q. With whom?

A. Penny Pember.

Q. What did she tell you?

A. That this was a practice that we needed to look at a little closer, see if we want to continue it.

Q. Did she say why?

A. Well, if you continue with granting light duty on a regular basis you can end up with more people doing paperwork than you do fighting fires.

Q. Do you have any reason to believe that actually [p. 64] happened with regard to the Clinton Township Fire Department?

A. I know that they have had people on light duty in the past. I do not know the specifics.

Q. You have no reason to know that, in fact, there were more light duty people than there were front line firefighters, do you?

A. I know that light duty does cost the Township.

Q. Well, my question was to you, you had discussions with Penny Pember and there was a concern that if this didn't stop there could be a day that there were people simply performing light duty work and no one fighting fires; is that correct?

A. She was concerned about the light duty to the Township.

Q. Did she cite to you any specific figures or any specific resources that could be looked at to determine –

A. Not that I recall.

Q. Where did you have this meeting with her?

A. I met with her on a regular basis.

Q. Was this in your office?

A. I don't recall.

Q. Did she order you to cease light duty?

A. I don't recall.

[p. 65] Q. When I asked you what your understanding of the concept of light duty was you said in some organizations it's a temporary assignment. Do you have knowledge as to what other organizations consider light duty?

A. No, no firsthand knowledge.

Q. Have you ever, with regard to your education or training, discussed how light duty fits into the scope of accommodating disabilities or handicaps?

A. I recall a very short discussion about that in some college level course.

Q. Do you recall any specifics of the discussion?

A. Basically that some organizations can reassign somebody to a different position if the position is available.

Q. Do you recall whether it was discussed whether that simply is temporary or whether it can also be permanent?

A. You must remember that when I took this course, the Americans with Disabilities Act was very new and there were a lot of different interpretations about what this law was going to mean to employers and to employees, and at that time there just was no case law to try to sort the thing out.

Q. It is your understanding today that light duty needs to be a temporary assignment?

[p. 66] MR. JENNINGS: Objection as to the relevance of what his understanding is today, but you can answer.

A. I believe that every member of the Clinton Township Division of Fire should pull his or her own weight to fight fire and to perform emergency services, and if they can't perform those services, then I'm not sure that I'm using the tax payers' dollars effectively.

Q. You don't feel that someone that can no longer use their services or pull their own weight, as you said, is entitled to be accommodated in some manner by the department?

MR. JENNINGS: I'm going to object. You're asking him a legal question and an opinion that he's not qualified to give and it has no relevance to the lawsuit.

Q. You can answer.

A. I believe that some organizations that are much larger than Clinton Township, they have the capability of reassigning people to positions that may be less, I guess, physical. Clinton Township is a small organization that does not have the resources to accommodate people who cannot perform the full firefighting duties, and requesting that Clinton Township make that type of accommodation would be an excessive strain on the budget.

[p. 67] Q. In the February 3rd meeting that you had with Mr. Myers and Mr. Fasone did you deny the request for light duty work?

A. Yes.

Q. When they requested – when I am saying "they," they came to you together; is that correct?

A. Yes.

Q. Did one speak for the other or were they both speaking individually?

A. I don't recall.

Q. So when I refer to they, let me know if one applies to one or the other. I don't want to confuse anything. When they came to you to request light duty, did they define to you what they were looking for?

A. I don't recall.

Q. When light duty was requested, was there any specifics proposed as far as follow-up on fire prevention, inspection or other paperwork?

A. I don't recall.

Q. When light duty was requested was there any specific requests as far as job parameters with regard to full time versus part time?

A. I don't believe that was discussed.

Q. The request for light duty was denied; is that correct?

[p. 68] A. Correct.

Q. And that was denied by you right there on the spot?

A. Correct.

Q. Did you say that you're not going to pay for the injuries for the next 40 years?

A. I don't recall.

Q. Is it possible that you said something like that?

A. I don't recall the content of the entire conversation.

Q. Earlier there was some questions posed to you with regard to Mr. Stokes or Lieutenant Stokes. At some point he was injured during 1993, I believe you testified; is that correct?

A. I'm aware that he had a medical condition that he acquired off duty.

Q. He was restricted in terms of being a front line firefighter for a period of time; is that correct?

A. I was not aware that he was restricted until after he had been assigned for a couple weeks doing fire

prevention. When he told me he was restricted, I told him that was light duty and he had to go off to sick leave.

Q. We then redefined restricted. When I say

* * *

[p. 72] authorization to move about as they choose because they may not be, I guess, contagious or something to that effect. So I received this on September 6 and considering that you are limited and that you are not ill, I will lift the restriction of being home while on sick leave until such time as you return to work.

Q. So you basically were giving him permission to not be under house arrest, so to speak?

A. That's your perspective. That's essentially correct though, yes.

Q. You said that Mr. Stokes returned to work for about two weeks following his sick leave; is that correct?

A. Sometime in the summer of 1993, Mr. Stokes apparently developed some sort of medical condition. He was off work for a time period. I don't remember what the exact time period was. When he returned to work I assigned him to perform the duties of the fire prevention officer which also includes full fire fighting duties in an effort to get caught up on fire prevention. He worked that position for approximately two weeks when he gave me this memo. I said this is light duty, you can't do this and we sent him home.

Q. Have any other employees, since you've been Chief, been injured requiring them to miss work?

* * *

[p. 92] A. With Penny Pember, yes. With the other trustees, no.

Q. Did you seek input from legal counsel or from any other person as to what you should, what standards you should apply as to whether you can be convinced of the facts of any particular injury leave?

A. That legal counsel was consulted regarding standards, no.

Q. I want to make sure that I'm clear from what you said earlier with regard to reasonable accommodations and light duty, that light duty is something that's only given temporarily, is that correct, as far as you're concerned.

A. As far as I am concerned there is no light duty in Clinton Township Division of Fire. In the past, I am aware of some temporary light duty assignments that were given prior to my appointment as the Fire Chief.

Q. Have you ever made inquiries with previous chiefs or through looking through documents to determine what standards those people applied in determining whether people could be awarded light duty?

A. I have not discussed it.

Q. Didn't look at any paperwork?

A. I'm aware that there is some paperwork that shows some people were granted light duty. I have no [p. 93] idea what the specifics to that was at the time.

Q. Your fire department you said has eight full-time employees, 20 part-time employees. Can you tell me off the top of your head, it's not a memory contest, but what their jobs are as far as you're one of the employees so you're the Chief. Who are the others, not names, but what are the positions?

A. There's an Assistant Chief, there are three lieutenants, and three firefighters.

Q. What about the 20 part-time employees?

A. The 20 part-time employees fill one position that's available every day and then they fill in when the three lieutenants or three firefighters are off duty on vacation or sick leave.

Q. These are firefighters?

A. Yes.

Q. In earlier questioning from Mr. Mathewson you said that you don't believe that light duty is an appropriate assignment in the fire service. Do you recall saying that?

A. That's correct.

Q. And you were talking about fire service in general not necessarily Clinton Township; is that correct?

A. That's correct, I believe that the tax payers [p. 94] have the right to have their tax dollars used in the most effective manner and that means out there handling the emergency when they need help, and you can't do that when you're on restricted duty.

Q. And that no fire department –

A. That's my personal opinion only. Obviously, other departments disagree with that. Some do it, some don't.

Q. You're familiar then with fire departments that do provide?

A. No specifics, I just know that there are some that do and some that don't.

Q. You learn of these at conventions or whatever?

A. Exactly.

Q. You testified earlier that you had confiscated Jim Myers' gear while he was a full-time employee. Do you recall that?

A. I believe so, yes.

Q. Had he already retired by the time you took his gear?

A. I don't believe so.

MR. STEIN: I think that's all the questions I have for you right now, and I thank you for your time.

MR. MATHEWSON: I'm done.

MR. JENNINGS: If it is ordered, we'll read.

* * *

Deposition Of Penny Pember (Excerpt)

* * *

[p. 12] Q. And it's my understanding that you were the liaison or the oversight of the fire division for Clinton Township during your term of office. Is that correct?

A. Not the full term, no.

Q. When did you become the oversight or liaison?

A. I'm not exactly sure of the – the date. It was sometime I think in 1992 for the fire department.

Q. Sometime – a short time after you started in office?

A. I really don't recall.

Q. You became the liaison for the board of trustees and the fire department prior to Chief Stickle being hired; is that correct?

A. Yes.

Q. And do you recall who Chief Stickle's predecessor was?

A. Chief Mitchell.

Q. And do you recall – was Chief Mitchell a temporary chief? Was he in office for a long time?

A. Yes, he had been.

Q. Okay. So you became the liaison while Chief Mitchell was still in office; is that correct?

A. Yes.

Q. Now, how did you come to become the liaison

* * *

[p. 31] A. No.

Q. Given the fact that you had no knowledge of anyone ever working light duty in the past, is it fair to say that you did not perceive light duty to be a central problem to the budget of Clinton Township?

MR. JENNINGS: Objection.

A. No. I'm – I – I'm – I didn't think it was a real big problem, no.

Q. Did you ever investigate light duty or restricted duty work to determine whether it was appropriate in light of federal or state law?

MR. JENNINGS: Objection. Calls for a legal answer. This witness –

MR. STEIN: I'm asking her whether she ever investigated it. Let's limit – your objections can be objection, but you shouldn't make suggestions.

A. I can't say I actually investigated it, no. I may have read it in what the law says or whatever in that – you know, the big poster that they send about discrimination, but that was probably about it, and I seen that at my regular job, so –

Q. Did you investigate or cause to be investigated whether light duty or – the types of costs that light duty could potentially cause to the township?

A. Yes.

* * *

[p. 33] Q. Okay. But this – you did not do – all right. Let me – let me make sure I understand you then.

Shortly after Chief Stickle began, you and he had a conversation. One of the things discussed was light duty; is that correct?

A. Yes.

Q. And at that point in time, the two of you came to a consensus that it was not appropriate for the fire division; is that correct?

A. Well, "appropriate" may not be the correct word. It was not – you can't have a light duty fire fighter.

Q. Okay. You and – you and he came to that conclusion shortly after he began?

A. Right.

Q. And he started in November of 1992?

A. As far as – yeah, sometime in that time.

Q. At that point in time or any point in time prior to that date, did you ever make a financial investigation as to the potential costs to the township of employing a fire fighter at light duty or restricted duty?

A. Prior to that, no.

Q. The shorthand calculations you referred to

* * *

[p. 61] for injury leave?

A. I don't recall that. I know we – we continued to grant, I think, sick leave on one fire fighter, but I couldn't tell you which one it was, and he was continue – he was paid constantly. He – he never did without any money.

Q. Were you aware that Mr. Myers in February of 1993 requested to be allowed to work in a manner that would not be affected by his medical restrictions?

A. I don't recall that, and if –

Q. In other words, he made request for light duty or restricted duty. You don't recall that?

A. No. But like, again, I say, fire fighters cannot perform light duty. There is just no means for light duty in Clinton Township.

Q. Well, my question goes to whether you knew whether he made a request, since you don't know – well, I don't want to put words in – was it your testimony that you don't recall or that he – that you were never told that he made a request?

A. I really don't – I don't recall.

Q. You don't recall then investigating Mr. Myers' request for light duty to determine whether or not it would be reasonable?

A. No, I don't recall that.

* * *

Deposition Of Paul Stokes (Excerpt)

* * *

[p. 10] A. No.

Q. You were not.

A. No.

Q. Did you return to work following your surgery?

A. Yes, I did.

Q. And when was that?

A. I don't recall the exact time, but it was 60 to 90 days, and I reported directly back to company as I recall.

Q. Okay. What about then just prior to your surgery – let me ask you this, what caused your neck injury?

A. I injured my neck on a roller coaster at Cedar Point and had to have surgery.

Q. It was not work related then?

A. No, it was not work related.

Q. Following your injury was there a period of time you were – prior to surgery was there a period of time that you were unable to work fire suppression?

A. Yes.

Q. And during that period of time were you allowed to work limited to fire prevention duties for the Township?

A. Not limited but, yes. I did work fire prevention duties.

[p. 11] Q. Okay. What period of time are we talking about here?

A. A couple of weeks.

Q. Well – chronologically is this September of '93?

A. I was injured in July of '93. I believe to the best of my memory, I was on – my doctor put me on sick leave for about 30 days and then released me to go back to work and I went back to work as my duties as fire prevention officer and then a couple of weeks after that, I went back to the doctor and she then said my duties had to be restricted because of the healing [sic] was not going as necessary and then the fire department said I could not work anything and then several weeks later I had surgery. That's the best I can recall. The chronological dates may be off a little bit.

Q. All right. That's fine. Prior to this ill-fated day at Cedar Point – by the way which ride was that so I know to avoid it?

A. Some roller coaster.

Q. Prior to that day at Cedar Point what were your job duties?

A. I was fire prevention officer for Clinton Township Fire Department, and I worked as a unit supervisor at Station 62.

* * *

[p. 26] Q. Do you remember when you wrote this?

A. No, I don't remember the exact date.

Q. The basic gist of this letter is that you were – following your accident but prior to your surgery, you were – this letter says you were allowed to work light duty so you didn't deplete your sick leave, and you don't feel that's accurate?

A. No, it is not an accurate statement.

Q. During the period of time that this letter refers to, is that the period of time that you were working fire prevention?

A. Yes, it is.

Q. Okay. And during that period of time, do you recall doing anything other than fire prevention duties?

MR. JENNINGS: I think he already answered that. You can answer again.

A. I don't recall doing anything other than fire prevention.

Q. Okay. Did you discuss prior to your return to work – following your injury at Cedar Point and prior to your return to work, did you discuss with Chief Stickle the type of injury you had and what limitations that might have caused you?

A. Prior to when now?

* * *

Supreme Court, U.S.
FILED
AUG 7 1998
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No. 98-63

In The

Supreme Court of the United States

October Term, 1997

S. AUGUST FASONE,

Petitioner,

vs.

CLINTON TOWNSHIP, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CLINTON TOWNSHIP, JOHN W. FROST, LARRY L. WILKES, PENNY S. PEMBER, RANDY STICKLE AND REBECCA CHRISTIAN

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. Americans with Disabilities Act Claim	1
B. Hostile Work Environment Claim	7
Reasons for Denying the Writ	11
I. Hostile Work Environment	12
A. Petitioner's Basis For A Writ Fails Because The Lower Courts Did Look At All The Evidence In Dismissing The Federal And State Law Hostile Work Environment Claims.	12
B. What Is Claimed To Be The Sixth Circuit's Analysis Does Not Conflict With Decisions Of This Court And Other Courts.	13
II. Americans With Disabilities Act Claim	18
A. Undue Hardship Is Not An Issue In This Case. Reasonable Accomodation Is The Issue In An ADA Case And It Was Factually And Properly Decided Below.	18

Page

B. Petitioner's Interactive Process Analysis Was Not An Issue Nor Even Addressed By The Courts Below. Reasonable Accommodation Is Always The Ultimate Issue And Petitioner's Cases Do Not Create New ADA Culpability Based On An Employer's Thought Process. 21

Conclusion 24

TABLE OF CITED AUTHORITIES

Cases Cited:

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Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667 (7th Cir. 1998) 22

Deane v. Pocono Medical Center, 142 F.3d 138 (3rd Cir. 1998) 21

Delaney v. Skyline Lodge, Inc., 95 Ohio App. 3d 264 (Hamilton Cty. 1994) 13

DeNovellis v. Shalala, 124 F.3d 298 (1st Cir. 1997) .. 16, 17

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 10, 13

Table of Cited Authorities

	Page
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)	17
Hill v. Goodyear Tire & Rubber, Inc., 918 F.2d 877 (10th Cir. 1990)	15
Lundblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989)	16
Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997)	21
Miller v. Illinois Dept. of Corrections, 107 F.3d 483 (7th Cir. 1997)	22
Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996)	18, 19
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	15
Plumbers and Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm., 66 Ohio St. 2d 192 (1981)	8, 13
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994)	8
Russell v. City of Overland Police Dept., 838 F. Supp. 1350 (E.D. Mo. 1993)	15, 16
Stone v. City of Mount Vernon, 118 F.3d 92 (2nd Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998)	20

Table of Cited Authorities

	Page
Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir. 1996)	22
United Airlines v. Evans, 431 U.S. 553 (1977)	17
Valentine v. American Home Shield Corp., 939 F. Supp. 1376 (N.D. Iowa 1996)	23
White v. Honeywell, 141 F.3d 1270 (8th Cir. 1998)	14, 15
Willis v. Conopco, 108 F.3d 282 (11th Cir. 1997)	23
Statutes Cited:	
42 U.S.C. § 1981	8, 9, 11, 12, 13, 14, 15, 16
42 U.S.C. § 3612(a)	17
Ohio Rev. Code § 4112.02(A)	12
Rule Cited:	
United States Supreme Court Rule 10	8, 18

STATEMENT OF THE CASE

Petitioner Fasone seeks this Court's review by misrepresenting key facts and by artfully creating legal issues that were not important in or arguably even part of the proceedings below. In essence, petitioner is asking this Court to redecide the factual/evidentiary rulings of the courts below. Neither of the two legal issues presented for review were even discussed or ruled upon by the Sixth Circuit which decided that under all the facts: (1) petitioner's allegations did not rise to the level of an ethnic hostile work environment claim; and (2) that Fasone could not prove an ADA claim where he admittedly could not do the essential functions of a firefighter and the law provides that a small township is not required to create a new permanent light duty position.

A. Americans With Disabilities Act Claim

Clinton Township is a small Ohio township with a small force of firefighters. There are no light duty jobs in this small department. At various times over the years injured firefighters have been allowed (although not required by the collective bargaining agreement) to work short, temporary light duty periods of convalescence. Temporary light duty requests were denied if there was no present need for light duty tasks. Mr. Fasone admits he knew this, as he himself was once granted a temporary light duty assignment. If a small fire department required to create permanent non-firefighter light duty jobs every time an employee is injured, a costly force of non-firefighters would be created. In fact, the same day Mr. Fasone requested a permanent light duty assignment, another firefighter also requested permanent light duty. This is not a safety net issue. Ohio law protects its injured fire and police officers through the creation of a special statutory disability fund which has provided a permanent pension to Mr. Fasone.

Petitioner would have this Court believe that Clinton Township had an available permanent light duty job and failed to accommodate Mr. Fasone by placing him in the position. This is simply not true and this allegation has been soundly rejected by the lower courts. The Sixth Circuit specifically ruled that based on the record: "Fasone was unable to rebut defendants' evidence that there was no vacant position of fire prevention officer." (A2.)[1] When Fasone requested permanent light duty there was no full-time fire prevention officer position. The fire prevention duties (which would not even amount to a full-time position) were performed by active firefighters, and those firefighters were still required to function as on-company firefighters at any time. An officer temporarily assigned to fire prevention tasks is not in a light duty position.

Clinton Township denies any allegation that it somehow failed to interact with Mr. Fasone or treated him unfairly in any way. Fasone, whose doctor reported that he was totally unable to perform the duties of any job he was trained for, simply requested the creation of a new permanent light duty position. There was no such job available and Clinton Township had never created any such position in the past. Fasone was *not* seeking a week or two temporary light duty assignment; he was requesting permanent light duty status. Mr. Fasone admitted in his deposition that he was requesting permanent light duty, and admitted that in 1991, 1992 and 1993 there was no such thing as a permanent light duty position for someone to do fire inspections and clerical work. (Joint Apx. 49-50.) Mr. Fasone was told that there was no such light duty. Any expanded interaction between Fasone and Clinton Township could not have changed the reality that:

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1. Citations to the Appendix are to the Appendix in Petitioner's Petition. Other citations of facts are to the Joint Appendix filed by appellant Fasone in the Sixth Circuit Court of Appeals.

- Fasone was permanently disabled from doing any of the physical tasks required of a firefighter;

- There was no permanent light duty position at Clinton Township;

- There was no need for a permanent light duty position at Clinton Township;

- Fasone was not a qualified individual with a disability because he could not, with or without reasonable accommodation, perform the essential functions of his job; and

- Neither the ADA nor the EEOC guidelines require the creation of an entirely new job.

The bottom line is that no type of interaction could change the fact that Fasone could not do the essential functions of his job. Reasonable accommodations do not include the creation of a new job which does not even resemble the former duties of the employee. Thus, this "interactive" process issue is really no issue at all in this case. The Sixth Circuit did not even discuss or make any ruling on this argument. The district court found no reason to discuss the claimed issue either. The Sixth Circuit, as did the district court, correctly applied the facts of this case to the elements of an ADA claim. Petitioner is inappropriately asking this Court to reconsider the facts and redecide the case based on a legal issue which is simply not part of the lower court opinions.

Once established that there was no accommodation available to Fasone, any other legal or factual analysis is superfluous. The following undisputed facts relevant to the ADA claim are

provided as background as petitioner has mischaracterized and over simplified this case to the point of it being factless:

Fasone Was Totally Disabled from Doing the Essential Functions of a Firefighter

- Fasone was employed as a firefighter for Clinton Township from 1982 until the time he *retired* in July, 1993. (Joint Apx. at pp. 339-341, 350, 451.)

- Fasone claimed that a hip injury on December 16, 1992 caused him to be permanently disabled and unable to work as a firefighter. (Joint Apx. at pp. 337-338, 340, 368, 370.) However, Fasone admits he applied for a disability retirement in *October 1992* in which he was required to swear he was permanently disabled. At this same time Fasone was continuing to work as a front line firefighter until December 16, 1992. (Joint Apx. at 338, 340.)

- Two months later, on February 2, 1993, knowing he could *never* be a firefighter, Fasone requested *permanent light duty*. (Joint Apx. at 368, 370.)

- Fasone again applied for disability retirement on April 23, 1993 complaining that he was permanently disabled, and he received the retirement, there being a determination of disability rendering him unable to be a firefighter. (Joint Apx. at p. 338.) In Fasone's disability retirement application, both of his doctors (Dr. Halley and Dr. LaHue) submitted reports giving their medical opinion that Fasone was *totally* unable to perform the *duties of any* job Fasone was trained for. (Joint Apx. at p. 282.)

- On June 28, 1993, Fasone retired (Joint Apx. at pp. 343, 486) after using up all his employment benefits and being awarded his disability retirement. With disability retirement and workers' compensation, Fasone was receiving approximately $34,740 per year, mostly tax free, and probably netting more than he earned when he was physically able to work. (Joint Apx. at pp. 353, 356.)

There Was No Accommodation Available

- On February 3, 1993, knowing he could never be a firefighter, Fasone demanded that he be placed on *permanent* light duty. (Joint Apx. at pp. 368, 370.)

- At the time of this request, another firefighter also made a request for permanent light duty. (Joint Apx. at p. 369.)

- There has *never been* such a thing as permanent light duty at the Clinton Township Fire Department. (Joint Apx. at p. 362.)

- There is *absolutely nothing* in the record showing that Fasone ever requested anything but permanent light duty. Fasone admits that is all he requested. (Joint Apx. at p. 347, 368-370.) While plaintiff at length discusses fire prevention duties, there is no fact in the record showing Fasone ever *actually requested* creation of a full-time fire prevention job, not even in his self-serving affidavit. (Joint Apx. at pp. 157-160.)

- Light duty at Clinton Township over the years has consisted only of short, temporary periods of convalescence. (Joint Apx. at 665.) Fasone himself once was granted a temporary light duty assignment. (Joint Apx. at pp. 370-371.) Assignment of any light duty is purely at the discretion of the Township under the systems manual. The collective bargaining agreement gives firefighters no rights to any light duty. (Joint Apx. at pp. 97, 99-133.)

- When Fasone requested light duty from Fire Chief Stickle on February 3, 1993, Stickle (the new fire chief as of November 2, 1992) informed Fasone that there was no longer light duty in the fire service under Stickle. (Joint Apx. at pp. 97, 368-369.)

- When Fasone requested a permanent light duty assignment (Joint Apx. at p. 370), he had no idea whether there was any such light duty available. To the contrary, the fire inspection tasks, which do not amount to a full-time assignment, were assigned to Dick Fisher, then Lt. Stokes in February, 1993. (Joint Apx. at p. 625.) Those fire prevention tasks were *in addition* to those of a regular firefighter. *Id.* The Clinton Township Fire Department has performed fire inspections and other similar tasks over the years. Any employee assigned such responsibility would also be required to function as an on-company firefighter at any time. The position of Fire Inspector is not considered to be a light duty position. (Joint Apx. at p. 97.) There is no separate position of fire prevention officer;

rather, these duties were assigned to a regular full-time firefighter.

- Clinton Township's financial problems are well documented, even though Fasone stated "their budget problem is not my concern." (Joint Apx. at p. 374.) Clinton Township has had to close a firehouse, lay off firemen, has had every fire department levy fail, and has seen Township revenues decrease because of the closing of major businesses. (Joint Apx. at pp. 633-634, 687.)

- Petitioner deceptively states that there was a "funded" fire prevention position at Clinton Township that was vacant. (Petition for Cert., pp. 8, 20.) This is contrary to testimony that creation of such a position would require the addition of a full firefighter's salary and was not within the strained budget of the department. (Joint Apx. at pp. 689-691.) Further, fire prevention was *fully assigned* during the time plaintiff claims he was unable to be a firefighter. (Apx. at pp. 97, 625.)

B. Hostile Work Environment Claim

At the outset, the Clinton Township parties deny that there was any harassment of Fasone based on his ancestry. There are no agreed facts on this claim, only vague allegations by Fasone. In fact, this entire claim was an afterthought by Fasone's attorney — the hostile work environment claim was not even part of the original complaint. Fasone is a white American male, and neither of his parents are from Italy. The lower courts, on summary judgment, construed Fasone's

allegations favorably as if they were true. Based upon the courts' judgment, the allegations simply do not rise to the level of a constitutional hostile work environment claim. The ruling was an application of fact to law, and Fasone *does not challenge* the legal standards for hostile environment applied by the lower courts. Rule 10 states that it is the policy of this Court not to grant certiorari to reapply facts to a properly stated rule of law. It is also important to note that Fasone retired because of a disability, and the ending of his employment had nothing to do with the § 1981 claim, nor is it alleged.

Fasone takes issue with the Sixth Circuit decision on the basis of a misguided and unfounded allegation that the Sixth Circuit did not review all the evidence. First, there is absolutely nothing in the opinion of the Sixth Circuit which discusses or addresses the issue of the scope of evidence it reviewed deciding there was no basis for a hostile work environment claim. There is nothing in the record or in the Sixth Circuit decision from which it can be implied that the Sixth Circuit did not review all the evidence and allegations. Second, there is nothing in the Sixth Circuit decision which even discusses the legal issue petitioner wishes this Court to review. As a matter of fact, the claimed legal issue was not an issue in the Sixth Circuit.

The district court did discuss the *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) issue, but its ruling is meaningless as the court *did* look at all the evidence. (07/23/96 Opinion, Petitioner's Appendix A12-A32.) The district court dismissed, via summary judgment, both the federal law § 1981 claim and the state law claim for hostile work environment. Ohio law discrimination and hostile work environment claims follow the exact same standards as Title VII claims and § 1981 claims. *Plumbers and Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St. 2d 192, 196 (1981); *Barker*

v. Scovill, Inc., 6 Ohio St. 3d 146 (1983). The district court stated "all of the harassing incidents that occurred during Fasone's employment are potentially includable in his state claim." (A29.) Based upon the entire record of Fasone's allegations, the district court found that there was insufficient evidence as a matter of law to establish a hostile work environment based on ethnicity. (A26-A32.) Further, the district court reconsidered its ruling. (02/28/97 Opinion, A5-A11.) In this Opinion, the court specifically discusses additional "new" evidence submitted by Fasone (including conduct prior to 1991) and decided that it did not support an ethnic hostile work environment claim. (A11-A12.) There is *no* discussion in the Opinion that the court was limiting the scope of review of evidence in considering the federal § 1981 claim. As stated above, it would not matter anyway since the court was considering *all* evidence on the state law claim which has the same standard as the federal claim.[2] Had the court not limited the review of evidence on the federal claim (which cannot be presumed from a reading of the 02/28/97 Opinion) the court would have reached the same result in granting summary judgment on the federal claim because *it is the same ruling* as on the state law claim.

Aside from there being no legal issue for this Court to review, the hostile work environment claim was an application of fact to law, and there is no need for this Court to reconsider or redecide the factual allegations involved in this case. By way of background, the following facts are briefly provided to show that the decisions below dismissing the hostile work environment claim were soundly based:

- Fasone retired in July, 1993 due to disability. There is no allegation that there is any connection to ethnic harassment.

2. Petitioner admitted in his Sixth Circuit appellate brief that the district court "gave consideration to *all* of the abuse directed at Mr. Fasone." (p. 32 from Appellant's Final Brief.)

- The last allegation of any abusive conduct whatsoever was on April 23, 1992, ending more than one year before he retired.

- Fasone could remember only a few sporadic events/comments which he believed to be abusive during 1991 and 1992, all having to do with only *one person* and most of which having nothing at all to do with ethnicity or Italian heritage.

- Prior to this period, Fasone could only give vague and conclusory testimony about what he alleged to be abusive.

- His only corroborating witness, Mr. Legg (who himself had an employment squabble with the Township over workers' compensation), could not identify a single specific ethnic slur or joke that he had any personal knowledge of from 1989-1993 and could not identify any person as harassing Mr. Fasone. (Joint Apx., 514-516.)

There are certainly more facts in this fact intensive case. However, it is not respondent's intention to reargue the case, other than to point out that the claim has been vigorously disputed by respondents and to provide a summary to show the allegations simply do not rise to the level of a hostile work environment. Sporadic statements which may include innuendo or jokes, which may be offensive, do not themselves support a claim for hostile work environment unless the alleged conduct is pervasively hostile and abusive so as to interfere with the employee's work performance and sufficiently alter the conditions of employment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). This is not a case which factually supports

such a claim, and the legal issue alleged by plaintiff has nothing to do with the outcome as discussed above.

REASONS FOR DENYING THE WRIT

Petitioner raises two issues as grounds for his petition seeking a writ of certiorari: First, may evidence of discrimination occurring before the 1991 amendment of 42 U.S.C. § 1981 be considered in determining whether an employer has engaged in an ongoing pattern of discrimination? Second, does an employer have a duty to interact with an employee in an attempt to find a reasonable accommodation under the Americans with Disabilities Act? Yet, neither issue was discussed in the Sixth Circuit's opinion. As a result neither issue was properly preserved for review by this Court. This defect is fatal and mandates that the petition for writ of certiorari be denied.

Nevertheless, even if the Sixth Circuit had considered the issues now asserted as grounds for granting a writ of certiorari to review its decision, these issues were not dispositive of the case below. This is not a proper forum to relitigate the facts or debate the sufficiency of the evidence. Rather, because the appeal is a matter of discretion, the Court's review is limited to cases which properly raise an important federal question. Petitioner has offered no compelling reason for this court to entertain the issues now being raised.

I.

HOSTILE WORK ENVIRONMENT

A. Petitioner's Basis For A Writ Fails Because The Lower Courts Did Look At All The Evidence In Dismissing The Federal And State Law Hostile Work Environment Claims.

First, there is no evidence that the Sixth Circuit did not look at all the evidence of the alleged discriminatory conduct. In its brief opinion, the Sixth Circuit merely commented on petitioner's claim of harassment and his ability to identify only a few specific discriminatory comments as support for holding that this evidence was "insufficient to establish a hostile work environment claim under either federal or Ohio law." (A3.) The Sixth Circuit made no distinction whatsoever between those alleged acts of discrimination occurring before the 1991 amendment and those occurring after. Accordingly, this issue has not been adequately preserved for review and the petition for writ of certiorari should be denied.

The district court considered only those alleged acts of discrimination occurring after the enactment of the Civil Rights Act of 1991 when it decided petitioner's Section 1981 claim. However, petitioner neglects to mention that the district court looked at all the evidence, including alleged discriminatory acts occurring both before and after the amendment, to rule on petitioner's state law discrimination claim brought pursuant to Ohio Rev. Code § 4112.02(A). (A29.) As noted by the district court, petitioner's state law claim of ethnic discrimination presented one main issue for adjudication. The district court was forced to decide whether the specific incidents of harassing conduct alleged by Fasone, when combined with his broad, conclusory and unsupported statements of daily harassment, are enough for a reasonable juror to infer that the harassment altered the conditions of his employment by creating

a hostile work environment. (A30.) As discussed earlier, the state law claim is the same as the federal claim, *Plumbers and Steamfitters, supra*; *Barker, supra.*

In initially deciding this issue, the district court looked at *all* of the alleged discriminatory conduct identified by petitioner and, after dividing the allegations into three different time periods, addressed the conduct alleged to have occurred during each time period. (A30-A31.) Applying the same standards and the same burden of proof, the district court nevertheless held that the alleged harassment did not alter the conditions of petitioner's employment to such a degree that it would be actionable. (A31-A32.) *See Delaney v. Skyline Lodge, Inc.*, 95 Ohio App. 3d 264 (Hamilton Cty. 1994), citing *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993). The district court dismissed petitioner's state law claim as it did the claim brought under Section 1981. (A32.) The district court also reconsidered its decision a few months later looking at additional evidence, and without separating the federal and state claims, again held there was no hostile environment. Thus, if the district court failed to consider those alleged discriminatory acts occurring prior to the 1991 amendment to 42 U.S.C. § 1981 when it decided petitioner's Section 1981 claim, it was no more than harmless error. As evidenced by its ruling on the petitioner's state law ethnic discrimination claim, consideration of all the alleged discriminatory conduct, whether occurring before or after the 1991 amendment, would have yielded the same result.

B. What Is Claimed To Be The Sixth Circuit's Analysis Does Not Conflict With Decisions Of This Court And Other Courts.

Given the district court's ruling, implicitly adopted by the Sixth Circuit, that *all* of the alleged discriminatory acts, taken together, did not rise to the level necessary to establish a hostile work environment claim, this is not an appropriate case in which

to examine whether a continuing course of conduct beginning prior to the 1991 amendment and continuing after it, allows the court to examine the pre-enactment conduct. The Sixth Circuit's decision contains *no pronouncement* on this issue and, therefore cannot be in conflict with the decisions of the First and Eighth Circuits cited by petitioner. Again, it can only be presumed that the Sixth Circuit did look at all the evidence in holding that both the federal and state law claims for hostile work environment failed.

Assuming *arguendo* the analysis of the issue goes any further, there was no need to look back beyond November 1991 to evaluate a continuing course of conduct as suggested by petitioner. As noted by the district court, Fasone could identify only two specific post-1991 instances of alleged ethnic slurs directed at him over a one and a half year time span. Because only those acts which occurred after November 21, 1991 are actionable under Section 1981, and those two acts are woefully inadequate as a matter of law to support a hostile environment claim, the court was not required to look at the conduct which predated the enactment.

Even if this Court were to read the Sixth Circuit's opinion as petitioner has read it, the Eighth Circuit's opinion in *White v. Honeywell*, 141 F.3d 1270 (8th Cir. 1998) is not in conflict with the Sixth Circuit's opinion in this case. In *White*, the district court opinion was reversed because it excluded evidence of a discriminatory statement made by a supervisor in plaintiff's chain of command which was made prior to the enactment of the 1991 amendment. In *White*, the court noted that this statement, offered as background evidence, if believed by the jury, would have helped the plaintiff to demonstrate knowledge and an ongoing pattern of racial harassment linked to management. However, the court also agreed with the district court that the statement itself was not actionable conduct because it fell outside

the time limitations imposed on the actionable conduct for this suit. *White*, 141 F.3d at 1276. That is precisely what the district court held in this case.

The impact of the Civil Rights Act of 1991 on Section 1981 claims differed significantly from its impact on Title VII claims. To the extent the Act amended Title VII, it was only with respect to the remedies available for discriminatory conduct which was already actionable. In contrast, the Act's amendment to Section 1981 broadened the scope of the conduct actionable under Section 1981. Prior to the amendment, Section 1981 proscribed racial discrimination only in the context of making or enforcing employment contracts. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this Court held that a claim of racial harassment was not actionable under Section 1981 prior to its amendment by the Civil Rights Act of 1991 because it involves conduct after the formation of the employment relationship. *Patterson*, 491 U.S. at 176-177. *Patterson's* bar against claims of racial harassment was also extended to harassment claims founded on the existence of a hostile work environment. *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877, 880 (10th Cir. 1990). The enactment of the Civil Rights Act of 1991 made conduct, previously not actionable, actionable.

This distinction becomes important when analyzing those cases which petitioner argues are in conflict with the Sixth Circuit's decision in this case. Both *Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010 (W.D. Mo. 1998) and *Russell v. City of Overland Police Dept.*, 838 F. Supp. 1350 (E.D. Mo. 1993) addressed the applicability of the additional remedies created by the 1991 amendment to the Civil Rights Act to cases involving conduct occurring prior to the amendment. In *Russell, supra*, a Title VII case, the court addressed the issue in response to a motion to strike the plaintiff's requests for liquidated and

punitive damages and for jury trial. There the court held only that where the conduct has been ongoing and continuous into the period following the enactment of the Civil Rights Act of 1991, the plaintiff is entitled to a trial by jury as to those claims, whether they occurred prior to the enactment or thereafter, and may be entitled to punitive damages. *Russell*, 838 F. Supp. at 1354. Whether the employer could be held liable for conduct occurring prior to the date of the enactment was not addressed in the opinion. In *Cunningham, supra*, where a Section 1981 claim was alleged, the court held that while continuous acts of discrimination occurring prior to the effective date of the amendment are timely, relief for such acts may only be given back to the limitations period. *Cunningham*, 995 F. Supp. at 1018. In this case, applying the reasoning from *Cunningham*, the court could look back no further than two years from the date petitioner filed his complaint for his claims to be timely under the applicable statute of limitations. *See Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989).

The First Circuit opinion cited by petitioner also dealt with the remedial aspects of the amendment in a Title VII claim. The analysis used by the First Circuit in *DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir. 1997) is consistent with that applied in the Eighth Circuit. In *DeNovellis*, the court held that the employee failed to offer sufficient evidence that discrimination was a factor in the adverse employment action taken after the effective date of the Civil Rights Act of 1991, as required to rely on the Act's damage provisions to recover for pre-Act adverse employment actions, under a serial violation or a continuing effects theory. In *DeNovellis*, the First Circuit affirmed the district court's opinion granting summary judgment to the defendant noting that while the plaintiff may have a triable issue as to liability for pre-Act discrimination, he had no right to a remedy under the law as it existed prior to the 1991 Act. *DeNovellis*, 124 F.3d at 306, 314.

Petitioner's reliance on *DeNovellis* underscores his intent to focus the Court's attention on the facts rather than the law. By contrasting the evidence presented by petitioner with that presented by the plaintiff in *DeNovellis*, petitioner does not demonstrate the alleged conflict. Rather, petitioner demonstrates that the case is fact-bound and not worthy of review by this Court.

Further, petitioner's contention that the Sixth Circuit's analysis failed to follow *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *United Airlines v. Evans*, 431 U.S. 553 (1977), is irrelevant. In *United Airlines*, this Court rejected the application of a continuing violation theory in a Title VII case in which a female flight attendant failed to file a timely claim when she was forced to resign her employment, in accordance with a policy of the airline, when she got married. That policy was later invalidated by the courts as a violation of Title VII. This Court held that she could not later challenge her forced resignation, once the time for doing so had long since passed, simply because a present act, perceived to be discriminatory, had occurred. *United Airlines*, 431 U.S. at 560. In *United Airlines*, this Court determined that "the critical question is whether any present violation exists." *Id.* The Court described the forced resignation as "merely an event in history which has no present legal consequences." *Id. Havens Realty* applied the continuing violation theory to the "neighborhood" claims of a black "renter" plaintiff and two "tester" plaintiffs, one black and one white, which challenged petitioner's continuing pattern, practice and policy of unlawful racial steering under the Fair Housing Act. *Havens Realty*, 455 U.S. at 368, 381. The Court's holding in *Havens Realty* was limited to Section 812(a) of the Fair Housing Act, 42 U.S.C. § 3612(a) which requires that civil suits be brought within 180 days after the alleged occurrence of a discriminatory housing practice. *Havens Realty*, 455 U.S. at 380. No broader application of the theory, as applied in *Havens Realty*, was suggested by this Court.

II.

AMERICANS WITH DISABILITIES ACT CLAIM

A. Undue Hardship Is Not An Issue In This Case. Reasonable Accomodation Is The Issue In An ADA Case And It Was Factually And Properly Decided Below.

Contrary to the position taken by petitioner, undue hardship is *not* an issue in this case. Petitioner mistakenly continues to maintain that Clinton Township had a fully funded slot available for a full-time Fire Prevention Officer. The facts do not support this conclusion and the Sixth Circuit completely rejected it. This Court does not take cases merely to correct factual findings made by the lower courts. As noted in Rule 10 of the Rules of the Supreme Court of the United States, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." In this case, the Sixth Circuit correctly concluded that petitioner was requesting that Clinton Township create a new position for him. (A2.)

Petitioner's statement that the "lower courts' acceptance of Clinton Township's conclusory assertions of undue hardship was an improper basis for summary judgment" (Petition, p. 17) is *not* what occurred in the lower courts. While the district court in its first decision discussed undue hardship, it specifically rejected the analysis as a dispositive issue in its reconsideration. (A7-A10.) The Sixth Circuit did not discuss undue hardship in its opinion. Thus, the resolution of petitioner's ADA claim in the lower courts did not turn on whether Clinton Township proved undue hardship. Rather, the courts' opinions were premised on petitioner's failure to prove a reasonable accommodation existed under the standard adopted by the Sixth Circuit in *Monette v. Electronic Data Systems Corp.*, 90 F.3d

1173 (6th Cir. 1996). *Monette* requires that the plaintiff employee bear the burden of showing that he is disabled and that, with or without a reasonable accommodation, he is "otherwise qualified for an existing position." *Monette*, 90 F.3d at 1186.

Petitioner was unable to overcome this initial hurdle because he admittedly could not perform the essential functions of his job as a firefighter and asked that he be given a permanent light duty position where no such position existed. As the Sixth Circuit noted in *Monette*, an employee has not met his burden, for example, where he requests indefinite leave until a position opens up or where he would require the employer to create a new position in order to accommodate his disability. *Monette*, 90 F.3d at 1187. Petitioner's request that he be given a permanent light duty position as a fire prevention officer was presumptively unreasonable in light of this standard. Thus, petitioner failed to establish his case and there was no need to address the issue of undue hardship. Neither the ADA nor the case law requires the creation of a new job.

While petitioner acknowledges that an employer need not create a new and unnecessary job for an employee who can no longer perform the necessary tasks of his or her own job because of a disability, that is precisely what he has repeatedly asked the courts to do. Petitioner's challenge to the lower courts' factual findings is misleading in that it completely disregards the Sixth Circuit's ruling that "there was no vacant position of fire prevention officer." (A2.) Based on this ruling the Sixth Circuit conclusively held that petitioner's proposed accommodation was not reasonable. (A2.) Petitioner cannot seriously argue that undue hardship must be proved by an employer in every ADA case. If such were the law, the request for the creation of a new job would raise a triable issue of fact in every case.

In essence, petitioner is asking this Court to reject the factual findings made by the lower courts. His citation to *Stone v. City of Mount Vernon*, 118 F.3d 92 (2nd Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998), illustrates the weakness in his argument. The fire department suing the City of Mount Vernon in *Stone* employed 109 firefighters and maintained two "light duty" bureaus. *Stone*, 118 F.3d at 93. Unlike this case, during the relevant time period, two vacancies occurred in the Fire Prevention Bureau which could be considered "light duty." Yet, Stone was not considered for these vacancies because, like Fasone, he could not fight fires. *Stone*, 118 F.3d at 94. Those facts bearing on the Second Circuit's reversal of the grant of summary judgment in favor of the employer included the fact that no person assigned to either of the light duty bureaus had ever been called on to perform fire suppression functions, that some 15-20 firefighters were assigned to one of these bureaus following injuries, and that although most of the assignments were temporary, the 10-year and 20-year assignments of two of the firefighters showed that career placement in those bureaus was not unprecedented. *Stone*, 118 F.3d at 100. Because the plaintiff in *Stone* was able to establish his *prima facie* case by identifying a vacant position that would constitute a reasonable accommodation, the court then could evaluate the undue hardship issue. *Stone*, 118 F.3d at 101. That is the complete opposite of the case here.

The analysis used in *Stone* is no different than the one employed in this case. The only difference is the strength of the facts supporting Stone's claim that reassignment to a light duty vacancy was a reasonable accommodation. Where, as here, the petitioner asks this Court only to redecide various factual issues and has raised no legal issue for review, his petition for writ of certiorari should be denied.

B. Petitioner's Interactive Process Analysis Was Not An Issue Nor Even Addressed By The Courts Below. Reasonable Accommodation Is Always The Ultimate Issue And Petitioner's Cases Do Not Create New ADA Culpability Based On An Employer's Thought Process.

Finally, petitioner asks this Court to resolve a perceived conflict in how the federal circuit courts have viewed whether an employer has an obligation to engage in an interactive process with the employee to determine if a reasonable accommodation is possible. This case, however, does not create such a conflict because the Sixth Circuit did not decide this issue even though it was raised by petitioner below. Moreover, none of the circuits have held that a failure to engage in an interactive process in and of itself violates the ADA.

In those cases cited by petitioner, the courts have stressed the importance of communication and cooperation between employers and employees in seeking reasonable accommodation. *Deane v. Pocono Medical Center*, 142 F.3d 138, 149 (3rd Cir. 1998); *Mengine v. Runyon*, 114 F.3d 415, 420-421 (3d Cir. 1997). The courts have not imposed liability on the employer for failing to do so. In *Mengine, supra*, the court recognized that "if reasonable accommodation is impossible, nothing more than communication to the employee of this fact is required." *Mengine*, 114 F.3d at 420. To the extent the Third Circuit identified any problem associated with failing to engage in an interactive process, it was limited to the "*risk*" of violating the ADA associated with failing to discover a way in which the employee's disability could be reasonably accommodated. *Mengine*, 114 F.3d at 420-421; *Deane*, 142 F.3d at 149. In *Deane*, the issue was not a basis for the court's decision and was discussed merely by way of *obiter dictum*. Yet, *Deane* and *Mengine* were the two cases principally relied on by petitioner to support his claim that a conflict exists among the circuits.

The Fifth Circuit's treatment of the issue is similarly limited. In *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996), while the court acknowledged that once an accommodation is properly requested, the employer has an obligation to participate in an interactive process in determining one, it did not reach this issue in deciding the case because the plaintiff never made a formal request for accommodation under the ADA. *Taylor*, 93 F.3d at 165. In *Taylor*, the plaintiff asked for only a reduction in his "objectives" and a lessening of the "pressure." *Id.* He did not mention that he had a bipolar disorder, any limitations resulting therefrom, or the need for any specific accommodation. *Id.* Thus, petitioner cannot rely on *Taylor* as a basis for establishing a conflict with respect to the issue of whether the employer must engage in an interactive process.

The Seventh Circuit has not imposed liability on employers merely for failing to engage in an interactive process. To the contrary, the Seventh Circuit rejected such a claim in *Miller v. Illinois Dept. of Corrections*, 107 F.3d 483 (7th Cir. 1997). In *Miller*, the court held that if a plaintiff cannot perform the essential function of the job even with a reasonable accommodation, there is no relief afforded by the ADA even if plaintiff can show an "improper motivation" by the employer. *Miller*, 107 F.3d at 484. Petitioner relies on *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998), and several other cases out of the Seventh Circuit to suggest a conflict facially worthy of this Court's review. However, in *Dalton, supra.*, the Seventh Circuit found disputed issues of material fact with respect to two of the nine plaintiffs in part because the employer failed to respond in any way to the suggested accommodation proposed by these two plaintiffs. *Dalton*, 141 F.3d at 677. The Seventh Circuit did not suggest that the employer would be liable as a result. It only held that a jury should decide the feasibility of the proposed accommodation.

Id. Again, the ultimate issue of fact is whether there was a reasonable accommodation. *See also Valentine v. American Home Shield Corp.*, 939 F. Supp. 1376, 1401 (N.D. Iowa 1996) ("This matter will therefore proceed to trial, if at all, only on the reasonableness of part-time employment as an accommodation to Valentine's disability." *Valentine* involves a myriad of issues and is not applicable to this case.)

The thought process employed by Clinton Township is of no consequence. In *Willis v. Conopco*, 108 F.3d 282 (11th Cir. 1997), the Eleventh Circuit specifically rejected the argument that petitioner advances here. In *Willis*, the court held that the ADA does not require an interactive process to determine a reasonable accommodation for a disabled employee such that the employer could be held liable merely for failing to engage in the process itself, regardless of whether a reasonable accommodation could in reality have been made for the employee. *Willis*, 108 F.3d at 285. In *Willis*, the Eleventh Circuit stated that

> [t]he ADA, as far as we are aware, is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.

Id. Otherwise, an employer would be liable for not investigating "even though an investigation would have been fruitless." *Id.*

There is no conflict among the circuits with respect to this issue and the Court should not strain to find one. However, even if the Court would determine that the conflict raised by petitioner does, in fact, exist, it is of no consequence because a failure to engage in an interactive process does not give rise to independent relief. The issue in every ADA case is whether a reasonable accommodation exists, and the level of interaction

cannot change the ultimate issue. To the extent petitioner seeks to add a *mens rea* element to the analysis, he invites the Court to impose civil liability on employers based only on bad thoughts. Such an invitation should be respectfully declined.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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